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Humonetarianism: The New Correctional Discourse of Scarcity

HADAR AVIRAM*

“Crime in the United States today imposes a very heavy economic burden upon both the community as a whole and individual members of it . . . in view of the importance . . . it is surprising that the cost information . . . is as fragmentary as it is.”

*Task Force on Assessment of the President’s Commission (1967)*¹

“You never want a serious crisis to go to waste . . . [t]his crisis provides the opportunity for us to do things that you could not do before.”

*Rahm Emanuel, speaking to the Wall Street Journal CEO Council (2008)*²

Introduction

In mid-April of 2009, the *San Francisco Chronicle* ran an unusual article, which may have raised eyebrows among followers of the chronicles of the War on Drugs. It concerned the resuscitation of the old marijuana legalization/regulation debate, but approached it

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1. PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, CRIME AND ITS IMPACT: AN ASSESSMENT 42 (1967) reprinted in CHARLES M. GRAY, THE COSTS OF CRIME 15 (Sage Publications 1979).

2. Gerald F. Seib, *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, at A2, available at <http://online.wsj.com/article/SB122721278056345271.html>.

from a less-than-beaten path. Among other things, it reported the following:

Experts say an unprecedented confluence of factors might finally be driving a change on a topic once seen as politically too hot to handle.

Among them: the recession-fueled need for more public revenue, increased calls to redirect scarce law enforcement, court and prison resources, and a growing desire to declaw powerful and violent Mexican drug cartels. Also in the mix is a public opinion shift driven by a generation of Baby Boomers, combined with some new high-profile calls for legislation — including some well-known conservative voices joining with liberals.

Leading conservatives like former Secretary of State George Shultz and the late economist Milton Friedman years ago called for legalization and a change in the strategy in the war on drugs. This year mainstream pundits like Fox News' Glenn Beck and CNN's Jack Cafferty have publicly questioned the billions spent each year fighting the endless war against drugs and to suggest it now makes more financial and social sense to tax and regulate marijuana.³

What would have led conservative scholars and pundits to support marijuana legalization? Until recently, the rhetoric surrounding marijuana possession and trafficking would have made such propositions unthinkable.⁴ As this article argues, this development is an example of a broader recent transition, which has transformed perceptions and policies within the criminal justice realm. The current financial crisis, complicated by the rise in correctional expenses⁵ and in their relative share of the budget,⁶ has

3. Carla Marinucci, *Political Winds Shift in Favor of Legalized Pot*, S.F. CHRON., Apr. 12, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/12/MNF0170FPU.DTL>.

4. See generally TROY DUSTER, *THE LEGISLATION OF MORALITY: LAW, DRUGS, AND MORAL JUDGMENT* (1970); ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* (2003) (for accounts of this type of rhetoric).

5. Second only to Medicaid, the correctional apparatus has become the fastest growing general fund expenditure in the United States. In the 2008 fiscal year, the most recent year data are available, states spent an estimated \$47 billion of general funds on corrections, an increase of 303% since 1988. They spent an additional \$4 billion in special funds and bonds and \$900

yielded a new set of correctional discourses and practices, fueled by a language of scarcity. Under this framework, perceptions are changed, and policies are created, with short-term savings in mind; right-wing and left-wing politicians alike feel comfortable stepping away from punitive policies whenever costs are cited; and correctional techniques are chosen and discussed mainly through their impact on taxpayers' wallets. The article refers to this discursive framework as *humonetarianism*, a non-punitive, yet non-humanitarian perspective on corrections. The article delineates the main premises of this new correctional paradigm, examines its application in a variety of stages in the criminal process, and analyzes its promises and pitfalls.

Humonetarianism is really a non-discourse. It approaches questions of criminal propensity, risk, deterrence, and rehabilitation through a prism of cost. That, in itself, is no novelty. Economists have been examining the criminal process through a perspective of cost for decades. Gary Becker, who introduced a cost-benefit approach to the analysis of the criminal justice system,⁷ sought to balance the costs of crime, which include the damages of the offense itself⁸ and the costs of apprehension.⁹ Becker estimates the cost of imprisonment as "the discounted sum of the earnings foregone and the value placed on the restrictions in consumption and freedom."¹⁰ Even in this rather basic analysis, which ignores the harm done later in terms of employability or the realities of prisons as criminogenic institutions, Becker specifies: "Fines produce a gain to the latter that equals the cost to offenders, aside from collection costs, and so the social cost of fines is about zero, as befits a transfer payment. The social cost of probation, imprisonment, and other punishments, however, generally exceeds that to offenders, because others are also

million in federal funds, bringing total corrections expenditures to nearly \$52 billion. With one in every fifteen state general fund dollars now spent on corrections, officials have little choice but to look there for savings. In doing so, however, they must be careful to find cuts that will not compromise public safety. CHRISTINE S. SCOTT-HAYWARD, VERA INST. OF JUSTICE, *THE FISCAL CRISIS IN CORRECTIONS: RETHINKING POLICIES AND PRACTICES* 3 (2009), available at http://www.vera.org/files/The-fiscal-crisis-in-corrections_July-2009.pdf (citing the National Association of State Budget Officers, State Expenditure Reports).

6. One in every fifteen state general fund dollars is currently spent on corrections. *Id.*

7. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 174 (1968).

8. *Id.* at 176.

9. *Id.* at 178.

10. *Id.* at 179.

hurt.”¹¹ Becker argues that fines are a preferable form of punishment; incarceration is more costly, and fines allow for an optimization of deterrence.¹² He rejects arguments about the “immorality” of fines, arguing that from an economic perspective all punishment is to be regarded as a “cost.”¹³ Aware of the problem of unequal resources, and therefore unequal punishment, he suggests tailoring the fine to the offender’s income¹⁴ (a system adhered to in Germany).¹⁵

Other early works paid particular attention to corrections. In an empirical study focusing on five California prisons and 128 local city and country jails within the state,¹⁶ researchers took into account and measured all outputs of the system, save for rehabilitation.¹⁷ They found that the efficiency of corrections is a function of many variables that contribute the costs of confinement and services;¹⁸ reaching an efficient optimum may be a delicate balancing act. For example, running one big prison instead of two smaller ones might be detrimental to other functions.¹⁹

The novelty in the new version of humonetarianism is the way in which the argument of cost has dominated public discourse. Beyond the analysis of economists and calculations of managers, it has permeated political reasoning and voter initiatives for legislation. It has become the *raison d’être* of various initiatives, and has come to be the major contender for public attention, to the point of being weighed, almost exclusively, against public safety. Remarkably, humonetarianism does not only exist in the realm of rhetoric; it has yielded a series of policies, many of which contradict the direction in which the criminal process has been progressing for the last three decades.

It is important to point out that humonetarianism is not driven by leniency rhetoric, nor are all of its aspects necessarily pushing

11. *Id.* at 179-80.

12. *Id.* at 180.

13. *Id.* at 199-200.

14. *Id.* at 201.

15. BUREAU OF JUSTICE ASSISTANCE, HOW TO USE STRUCTURED FINES (DAY FINES) AS AN INTERMEDIATE SANCTION (1996), available at <http://www.ncjrs.gov/pdffiles/156242.pdf>.

16. Michael K. Block & Thomas S. Ulen, *Cost Functions for Correctional Institutions*, in THE COSTS OF CRIME 187, 187 (Charles M. Gray ed., 1979).

17. *Id.* at 189.

18. *Id.* at 192-194.

19. *Id.* at 200.

toward leniency. As the examples in this article show, humoneterianism may lead to cuts in various pro-inmate programs, such as medical care²⁰ and rehabilitation.²¹ Cost-driven rhetoric also leads to techniques that are neither punitive nor lenient, and whose purpose is to “juke the numbers” with regard to number of inmates, such as transferring inmates from state prisons to local jails,²² transferring inmates between states,²³ and moving undocumented immigrants to the hands of federal authorities.²⁴ Nevertheless, the developments that go opposite to the punitive direction are quite staggering, and their acceptability in the political realm is notable enough to mark a new chapter in political discourse.

Humoneterianism is not endemic to California. A recent report, prepared by the Vera Institute of Justice, has detailed a series of humoneterian practices adopted by at least twenty-six states.²⁵ Nevertheless, this article focuses mostly on examples from California. The reasons for this are twofold. First, California seems to have the most severe correctional crisis to date. While the number of inmates per capita is not the highest in the United States,²⁶ California has the largest prison population in total numbers.²⁷

20. Editorial, *Prison Health Costs Are Too High: Receiver Must Cut Expenses in Order to Restore Credibility with Public*, MCCLATCHY-TRIB. BUS. NEWS, Mar. 18, 2009.

21. Twenty states have made cuts to their rehabilitative programs. SCOTT-HAYWARD, *supra* note 5, at 6.

22. Molly Hennessy-Fiske & Richard Winton, *Bid to Divert California Prisoners to County Jails Denounced*, L.A. TIMES, May 23, 2009, available at <http://articles.latimes.com/2009/may/23/local/me-jails23>; Bobby White, *California Inmate Plan Draws Ire*, WALL ST. J., June 13, 2009, at A3, available at <http://online.wsj.com/article/SB124485349609411619.html>.

23. Amy Lane, *Michigan Offers to Take California Prisoners*, CRAIN'S DETROIT BUS., June 29, 2009, available at <http://www.crainsdetroit.com/article/20090629/FREE/906299962#>; Kathryn Lynch-Morin, *The Fate of Standish Max Still Uncertain*, BAY CITY NEWS, July 21, 2009, available at http://www.mlive.com/news/baycity/index.ssf/2009/07/the_fate_of_standish_max_is_st.html; Karen Bouffard, *California Won't Send Prisoners to Michigan*, DETROIT NEWS, Aug. 18, 2009, available at <http://www.detnews.com/article/20090818/POLITICS02/908180396/1409/METRO/Calif.-won-t-send-prisoners-to-Mich>.

24. Jon Ortiz, *CCPOA President Talks About State Layoffs*, SACRAMENTO BEE STATE WORKER, May 19, 2009, http://www.sacbee.com/static/weblogs/the_state_worker/2009/05/ccpoa-president-talks-about-st.html.

25. Matthew Yi & Wyatt Buchanan, *Plan to Free State Inmates Moves Ahead*, S.F. CHRON., Aug. 21, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/08/21/MNQS19BFR3.DTL>. See also SCOTT-HAYWARD, *supra* note 5.

26. PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 11 (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf.

27. The total population on July 29, 2009 was 167,755. CAL. DEP'T OF CORRS. & REHAB., WEEKLY REPORT OF POPULATION 1 (Aug. 3, 2009), available at <http://www.cdcr.ca.gov/>

Moreover, due to California's universal parole policy, the state also has the largest number of parolees.²⁸ Second, California has been among the first states to initiate certain punitive measures. As one of the first to adopt determinate sentencing²⁹ and Three Strikes,³⁰ California's meteoric increase in number of inmates is a phenomenon that started back in the 1980s.³¹ While most of the examples focus on California, I provide some information about other states to show that humonetarianism in California is not an outlier, but part of a national trend.

Outlining a "history of the present"³² is a difficult task; in addition to the usual disputes about generalizing broad trends from a plethora of initiatives and events in legislative, judicial, and correctional sites, there is a risk of misunderstanding long-term trends due to the lack of perspective. It is important, therefore, to examine humonetarianism in light of the developments that yielded our correctional policies prior to the financial crisis.

Part I of this article offers two complementary discourses to understand this transformation. The first, a political-punitive revolution, was fueled by a combination of dangerousness rhetoric and just retributivist ideology.³³ It has propelled the United States to lead the world in number of inmates per capita,³⁴ and to create a

Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOPIA/TPOPIAd090729.pdf.

28. PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 42 (2009), available at http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf. See also JOAN PETERSILIA, RYKEN GRATTET & JEFFREY LIN, U.S. DEP'T OF JUSTICE, PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA (2008).

29. California's Uniform Determinate Sentencing Act was adopted in August 1976 and became effective on July 1, 1977. MARK A. PETERSON, UPDATE ON THE IMPACTS OF CALIFORNIA'S DETERMINATE SENTENCING I (1980).

30. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4-5 (2001).

31. Franklin E. Zimring & Gordon Hawkins, *The Growth of Imprisonment in California*, 34 BRIT. J. CRIMINOLOGY, SPECIAL ISSUE 1994 83, 84 (1994).

32. This term comes from David Garland's description of the punitive and restrictive social space. DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY I (2001).

33. Some see it as a function of race-centered ideology. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS (1997). Others emphasize the part played by left-wingers in generating it, out of a sentiment of disparity. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).

34. Charles M. Blow, Op-Ed., *Getting Smart on Crime*, N.Y. TIMES, Aug. 15, 2009, at A19; see also PEW CTR. ON THE STATES, *supra* note 26, at 5.

variety of punitive innovations such as the Three Strikes Law,³⁵ registration and notification laws for convicted sex offenders,³⁶ and broad criminalization of gang-related activity.³⁷ The second story, told less often but no less influential, is the transformation of correctional policies from an individualized approach to a managerial, actuarial approach. Mass incarceration has yielded correctional practices that treat inmates according to their estimated risk and generate internal metrics to assess the efficiency of confinement, rather than a reduction in recidivism.³⁸ The turn to humonetarianism can, therefore, be described in two ways: (1) a 180-degree turn away from the political punitive discourse, or (2) the natural continuation of actuarial discourse. Finally, the main characteristics of humonetarianism are discussed: an emphasis on cost-driven arguments, political bipartisanship, and features of emergency and superficiality.

Part II of the article sketches such an introduction, beginning with the positivist penological ideas that fueled the era of indeterminate sentencing and rehabilitative corrections prior to the late 1970s. It then tells the story of the conversion to a system of determinate sentencing, with increasingly punitive sentencing schemes and broad post-incarceration supervision.

Part III provides a descriptive journey through humonetarian discourse and practices, following the chronology of the criminal process. Humonetarian developments include decriminalization initiatives in particular and a narrowing of the reach of criminal law in general; a shift toward non-custodial sentencing alternatives, and away from the death penalty; various measures for decreasing prison populations, including good credits and more liberal parole policies; and a push toward a decrease in post-incarceration supervision.

Finally, Part IV examines the strengths and weaknesses of the humonetarian discourse. On one hand, humonetarianism emerges as a paradigm capable to produce change, especially given what we

35. ZIMRING ET AL., *supra* note 30.

36. Megan's Law. Assem. 486, 2003-04 Leg., Reg. Sess. (Cal. 2004), *available at* http://leginfo.ca.gov/pub/03-04/bill/asm/ab_0451-0500/ab_488_bill_20040924_chaptered.html.

37. For a study casting doubt on the efficacy of such measures, see A.C.L.U. FOUND. OF S. CAL., FALSE PROMISE: THE BLYTHE STREET GANG INJUNCTION AND ITS AFTERMATH (1997), *available at* <http://www.streetgangs.com/injunctions/topics/blythereport.pdf>.

38. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 455-57 (1992).

know based on extensive research into public punitiveness. On the other hand, there are serious concerns that the focus on cost-related considerations will not only obscure deeper problems that underlie the criminal justice system, but also produce short-sighted solutions, which may turn out for the worse when the economy improves.

I. The Emergence of Humonetarianism: Therapists, Politicians, and Managers

A. Therapeutic Discourse and its Discontents

It is easier to understand the magnitude of the transition away from punitive policies when considering them in light of the developments that led to the current punitive sentencing regime and mass incarceration. The vast majority of scholars provide some account — political, judicial, or penological — of a “turn” in the second half of the 20th century, which reflected an increase in punitiveness.³⁹ There are different accounts for this punitive “turn.”

Some date the transition to the late 1960s, attributing it to President Nixon’s reliance on crime control as an election platform and to the policies advocated by the Nixon administration,⁴⁰ while others emphasize the retreat from due process decisions in the post-Warren Supreme Court.⁴¹ Others focus more on political and penological developments in the mid- to late 1970s.⁴² The major legislative change, however, occurred in the late 1970s. Prior to the transition from indeterminate to determinate sentencing, California (as well as most U.S. states) based its sentencing and correctional regimes on a positivist ideology, attributing criminality to a variety of environmental factors that were inexorably linked to the

39. A few scholars express doubt about this prevalent approach, arguing that punitiveness has historically characterized the criminal justice system, and that current scholarship is characterized by an exaggerated focus on recent examples of punitiveness. Roger Matthews, *The Myth of Punitiveness*, 9 THEORETICAL CRIMINOLOGY 175 (2005).

40. In her historical account of the emergence of “law and order,” Beckett attributes the animus behind this change to a backlash against the civil rights movement, and provides evidence for racial undertones. BECKETT, *supra* note 33, at 3.

41. WHITEHEAD & SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 5 (2006) (emphasizing the increase in the Court’s trust in the police and prosecution and the importance placed on finality).

42. GARLAND, *supra* note 32; *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); Zimring & Hawkins, *supra* note 31.

offender's characteristics and circumstances.⁴³ This logic was the basis for the indeterminate sentencing regime, under which criminal sentences were tailored to the characteristics of the specific offender.⁴⁴ This system provided judges with broad discretionary powers,⁴⁵ and also relied heavily on the discretion of parole boards, which were vested with the power to determine whether a given offender had been rehabilitated and could return to society.⁴⁶

This sentencing scheme, however, became increasingly vulnerable to heavy criticism. Much of the critique focused on the arbitrary nature of indeterminate sentencing, which led to large sentencing disparities. Two influential sources of critique were the American Society of Friends and Judge Frankel. The American Society of Friends, in their influential memo *Struggle for Justice*, argued that the flexible nature of punishment, and especially the reliance on unsupervised parole boards, was rigged against minorities and working class inmates, who would end up serving long terms disproportionately to their crimes.⁴⁷ Similar points were made, at the time, by Judge Frankel in his widely read *Law without Order*.⁴⁸ Both of these critics expressed the hope that a more rational and systematic sentencing regime would put an end to large differences in sentencing, and in particular to the blatant racial disparities they observed.⁴⁹

43. Most criminological literature of the first half of the 20th century was written in this vein. By contrast to doctrinal criminal law, which relied on a structure of rational free choice as a basis for punishment, criminological theory focused on predetermined factors pertaining to each individual offender as the basis for explaining criminality. These often involved environmental factors, concerning the offender's neighborhood, surroundings, and associations. See, e.g., EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* (3d ed. 1939); CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY AND URBAN AREAS* (1942). At most, some theorists accounted for a mix of free will and predetermined circumstances. See, e.g., DAVID MATZA, *DELINQUENCY AND DRIFT* (1964).

44. STITH & CABRANES, *supra* note 33.

45. *Id.*

46. W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 909 (2009).

47. AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA* (1971).

48. MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973). Judge Frankel later played a seminal role in the design of determinate sentencing. See STITH & CABRANES, *supra* note 33, at 35. For a historically-sensitive critique of Frankel's work, see Lynn Adelman & Jon Deitrich, *Marvin Frankel's Mistakes and the Need to Rethink Federal Sentencing*, 13 BERKELEY J. CRIM. L. 329 (2009).

49. Incidentally, the shift to determinate sentencing has not corrected the racial disparities. Blacks and Latinos are strongly overrepresented in the prison system. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 203 (1991).

At the same time, the rehabilitative paradigm was under attack from conservative circles as well. Increasing doubts about the success of rehabilitative programs in prison, raised since the early days of the Nixon administration,⁵⁰ were finally articulated in a groundbreaking article by Robert Martinson, published in 1974 in *The Public Interest*, and titled *What Works*.⁵¹

What Works was a meta-research, examining the findings from evaluation studies of more than 600 prison rehabilitative programs. Martinson's conclusions about those were rather grim. Generalizing from these studies, he found there was:

very little reason to hope that we have in fact found a sure way for reducing recidivism through rehabilitation. This is not to say that we did not find instances of success or partial success; it is only to say that these instances have been isolated, producing no clear pattern to indicate the efficacy of any particular method of treatment.⁵²

Unsurprisingly, *What Works* came to be known by criminologists and policymakers as “Nothing Works.” It created an intense sentiment of despair of, and disbelief in, rehabilitation and in indeterminate sentencing. This despair, in fact, fuelled literature that suggested adopting more modest aims for the criminal process, such as focusing on a retributivist philosophy of punishment. One such influential text was Andrew Von Hirsch's *Doing Justice*, which is considered by many to have rekindled retributivism as the basis for sentencing.⁵³

For several decades after its publication, *What Works* was maligned by critics from the left wing, who exposed its empirical claims to meticulous reexamination⁵⁴ and even produced follow-up

50. See MICHAEL JACOBSON, *DOWNSIZING PRISONS: HOW TO REDUCE CRIME AND END MASS INCARCERATION* (2005).

51. Robert Martinson, *What Works? Questions and Answers about Prison Reform*, 35 *THE PUBLIC INTEREST* 22 (1974).

52. *Id.* at 25.

53. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS: REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* (1976). See also Andrew Ashworth, *Four Techniques for Reducing Sentence Disparity*, in *PRINCIPLED SENTENCING: READING ON THEORY AND POLICY* (Andrew von Hirsch & Andrew Ashworth eds., 1998).

54. David Farabee, *Reexamining Martinson's Critique: A Cautionary Note for Evaluators*, 48 *CRIME & DELINQUENCY* 189, 189-90 (2002).

pieces that reached more optimistic conclusions about rehabilitation.⁵⁵ Martinson's work was reviled as a tool in the hands of right wingers who used it to kill rehabilitation programs and reinstate heavy sentencing. Some of this critique is unfair, in light of the fact that Martinson himself greatly modified his findings later to express more optimism regarding recidivism-reduction programs.⁵⁶ However, the important point is that Martinson's work did not, by any means, call for an increase in imprisonment. And neither did any other evidence-based project or report at the time. In fact, the 1973 National Advisory Commission recommended that no new prisons or jails be built, due to their evident failure.⁵⁷ Even the American Correctional Association broadly supported intermediate sentences and non-custodial community options, as well as drug treatment programs.⁵⁸ The transition to punitiveness that followed was a far cry from Martinson's call for correctional accountability and evidence-based evaluation, an ethos left largely unheeded as corrections experts and prison administrators were supplanted by governors and legislators.⁵⁹

B. 1977-2008: Two Penological Stories

i. The Political Story: Expressive Punitive Discourse

One of the most significant developments marking the new era was the transition to determinate sentencing schemes. Adopted by California in 1977⁶⁰ and in the Federal system in 1980,⁶¹ the new system relied on matching the punishment to the offense rather than to the offender. One outcome of the new system was the narrowing of judicial discretion⁶² and parole board authority,⁶³ while

55. LAURENCE SHERMAN ET AL., PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T WORK, WHAT'S PROMISING 9-12 (1998); Christy Visher & David Weisburd, *Identifying What Works: Recent Trends in Crime Prevention Strategies*, 28 CRIME, LAW AND SOCIAL CHANGE 223, 230-37 (1998).

56. JACOBSON, *supra* note 50, at 24.

57. GARLAND, *supra* note 32, at 211.

58. JACOBSON, *supra* note 50, at 23.

59. *Id.*

60. CAL. PENAL CODE § 1170 (West 2009).

61. STITH & CABRANES, *supra* note 33, at 238.

62. *Id.*

63. JOAN PETERSILIA, CAL. POL'Y RESEARCH CTR., UNDERSTANDING CALIFORNIA CORRECTIONS 59-67 (May 2006).

transferring discretion to the shoulders of legislators, sentencing commissions, and prosecutors.⁶⁴ Some prosecutors now used the new categories as the basis for charge bargaining.⁶⁵ By concentrating correctional power in the hands of lawmakers, the new system became more open to political pressure.

Indeed, one possible way to chronicle punitivism is by following political rhetoric and its impact on the policies that were enacted throughout the 1980s and 1990s. Katherine Beckett, who documented the emergence of punitive policies, has demonstrated that politician-driven rhetoric and media campaigns have preceded public opinion changes in a punitive direction, as well as the eventual legal changes that implemented punitive policies.⁶⁶ One such example is the emergence of the “War on Drugs” campaign in the early 1980s. Its broad public support had been preceded by an extensive media campaign.⁶⁷ Politician-driven punitive campaigns are impacted by a perception according to which being “soft on crime” is an untenable position for anyone wishing to be elected for office.⁶⁸

In generating public attention to crime as a high-profile problem, lawmakers were aided by other interest groups. During the 1980s, correctional unions had become strong allies to politicians.⁶⁹ One such notable union was the California Correctional Peace Officers Association (“CCPOA”), which forged particularly strong ties with the California government.⁷⁰ During the 1990s, new actors appeared on the political map, in the form of victim advocates and organizations whose immense rhetorical and symbolic power⁷¹ manifested itself in the form of punitive legislation enacted following extreme and shocking crime incidents.⁷² These incidents were portrayed by the media not as outliers, but as cautionary events.⁷³

64. STITH & CABRANES, *supra* note 33, at 132.

65. *Id.*

66. BECKETT, *supra* note 33, at 14-27.

67. *Id.* at 16-23.

68. SIMON, *supra* note 42, at 34-35.

69. JACOBSON, *supra* note 50, at 23.

70. ZIMRING ET AL., *supra* note 30, at 5.

71. SIMON, *supra* note 42.

72. Two such notable examples are Megan’s Law, CAL. PENAL CODE § 290.46 (West 2009), and Jessica’s Law. See Jason Peckenpaugh & Joan Petersilia, *Controlling Sex Offender Reentry: Jessica’s Law Measures in California* (Stanford Criminal Justice Ctr., Working Paper, 2006), available at http://www.law.stanford.edu/program/centers/scjc/workingpapers/JPeckenpaugh_06.pdf. Proposition 9 in California, approved by voters but not yet fully

Punitive legislation originated from lawmaker bills as well as from voter initiatives. Some notable examples include the birth of California's Three Strikes Law.⁷⁴ While the law received much attention due to its provision of life sentence without parole for third-time felons,⁷⁵ its impact had been much broader. It doubled the sentence for second-time felons⁷⁶ and strengthening the prosecutor's bargaining power by making the introduction of "strikes" at sentencing into a bargaining chip.⁷⁷ In addition, specialized sentencing regimes emerged for other categories, such as drug offenders, gun offenders, gang-related crime, and in particular, sex offenders.⁷⁸

Another category of offenders that generated public attention was those released from prison. While parole discretion had diminished greatly under the determinate sentencing scheme, parole supervision had been retained. The regime in California was particularly extensive, subjecting virtually all released State inmates to a lengthy period of parole supervision. As an impediment to relaxing parole, media stories focused on reoffending parolees, particularly with regard to shockingly violent crime.⁷⁹ Parole policies were shaped

incorporated into law, was also known as Marsy's law. Marsy's Law, Friends of Marsy's Law — Vote Yes on Prop 9, <http://www.friendsofmarsyslaw.org/> (last visited Aug. 23, 2009).

73. The coverage of Jessica Lunsford's killer, during the enactment of Jessica's Law, is a case in point. Susan Candiotti, *Child Killer Sentenced to Death*, CNN, Sept. 24, 2007, <http://www.cnn.com/2007/US/law/08/24/couey/index.html>.

74. For a general overview of Three Strikes law and its effect on sentencing, see J. RICHARD COUZENS & TRICIA A. BIGELOW, CALIFORNIA THREE STRIKES SENTENCING 1-1 — 1-13 (2009).

75. *Id.*

76. *Id.*

77. ZIMRING ET AL., *supra* note 30, at 27.

78. Peckenpaugh & Petersilia, *supra* note 72.

79. For an example, see the coverage on Lovelle Mixon after the tragic Oakland Police shooting. See Jill Tucker, *Community Wasn't Told of Oakland Girl's Rape*, S.F. CHRON., Mar. 26, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/03/ED5Q16RQAU.DTL>. Another recent example is the Philip Garrido kidnapping case of Jaycee Lee Dugard, which emphasized his former crimes and parolee status. Tony Saavedra, Michael Mello & Greg Hardesty, *Law Enforcement Misses Earlier Opportunities to Save Jaycee*, ORANGE COUNTY REG., Aug. 28, 2009, available at <http://www.ocregister.com/articles/garrido-parole-hinkle-2545430-yards-years>.

with attention not to actual risk, but to fear, as the motivating factor.⁸⁰

ii. *The Managerial Story: Administrative Actuarial Discourse*

While the political punitive discourse shaped crime rhetoric and sentencing policies, correctional practices developed under a somewhat different paradigm. In an article from 1992, Malcolm Feeley and Jonathan Simon identified patterns of a “new penology” emerging at the administrative level.⁸¹ This paradigm represents a shift away from the traditional concerns of criminal law and criminology, which have focused on the individual, and toward actuarial considerations of aggregates. The original aims of punishment, such as deterrence and rehabilitation, lose their importance, and even the renaissance of retributivism is not the focus of punishment; instead, the focus is on incarceration as a way to manage the population according to the risks it poses.⁸² Other surveillance methods, such as parole supervision, are also shaped in a way that addresses the selective risk posed by the population; while individual parole officers may not embrace this vision, and continue to view their role through a prism of individual attention, policymakers shape the discourses and technologies of parole to address risk.⁸³ Under the actuarial paradigm, substantive measures of penological success, such as reducing recidivism, are no longer seen as attainable, and success is measured by internal, administrative metrics, such as preventing escapes and obtaining clean urine samples from parolees.⁸⁴

The New Penology and the political-punitive story are not contradictory; they can be seen as two sides of the same coin. Punitive discourse, fuelled by media uproar and public fear, governs

80. For an example, see the California Division of Adult Parole Operations’ “Operation Boo,” monitoring sex offenders during Halloween, explicitly designed to address public fear rather than realistic concerns about crime. Press Release, Cal. Dep’t of Corrs. & Rehab., CDCR Parole to Conduct Random Sex Offender Checks During “Operation Boo” on Halloween Night (Oct. 30, 2008), available at http://www.cdcr.ca.gov/News/2008_Press_Releases/Oct_30.html.

81. Feeley & Simon, *supra* note 38.

82. Jonathan Simon, *From the Big House to the Warehouse: Rethinking Prisons and State Government in the 20th Century*, 2 PUNISHMENT AND SOCIETY 213 (2000).

83. Mona Lynch, *Waste Managers? The New Penology and Parole Agent Identity*, 32 LAW & SOC’Y REV. 839, 861-66 (1998).

84. Feeley & Simon, *supra* note 38.

the public realm, while in the invisible realm of the prisons, managerial concerns require a shift from individualized attention to mass warehousing. The increase in incarceration rates, caused by punitive sentencing initiatives and policies, yields more subjects under supervision, which in its turn generates more internal metrics for risk assessment, and these lead a substantial percentage of these subjects back to prison.

This cycle of visibility and invisibility becomes severely disrupted, however, when resource scarcity brings the invisible space of prisons into the public eye. We now turn to examine the nature of this disruption.

C. The Emergence of Humonetarianism

i. The 2007 Financial Crisis and Its Impact on the Correctional Realm

As the federal government and many states started grappling with the current financial crisis, the investment in punitive techniques became untenable. Correctional expenses constitute seven percent of the budget nationwide as well as in California.⁸⁵ The amount spent nationwide on corrections has increased by 303% between 1988 and 2008.⁸⁶ A recent Vera Institute of Justice report finds twenty-six states that have cut funding for corrections, thus reversing a three-decade trend.⁸⁷

Before examining the particular aspects of the system addressed by proposals and budget cuts, it is important to reflect on the impact of the financial crisis on the visibility of the correctional system. One reason for the increase in punitive initiatives has been what Franklin Zimring has called “the correctional free lunch.”⁸⁸ While sentencing is being meted by the county, the correctional burden falls on the shoulders of the state. This leads to political pressures for

85. Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT’G REP. 332, 333 (2002); Andy Furillo, *Schwarzenegger Plan Would Save Nearly \$1 Billion in Prisoner and Parolee Costs*, SACRAMENTO BEE, Jan. 2, 2009, available at <http://www.sacbee.com/capitolandcalifornia/story/1511503.html>.

86. SCOTT-HAYWARD, *supra* note 5, at 2.

87. *Id.*

88. ZIMRING ET AL., *supra* note 30.

punitive legislation, without regard to their impact at the correctional end.

The financial crisis violates the boundary between the visible and the invisible, by exposing policymakers, and the public, to the financial realities of the correctional apparatus. Since the emergence of the crisis, numerous newspaper editorials have addressed the correctional crisis from a financial perspective.⁸⁹ Corrections are thus presented as a burden on citizens' wallets,⁹⁰ as well as a budget slice at the expense of other important public services.⁹¹

Moreover, the practical outcome of humonetarianism is a series of policies aimed at reducing the budget deficit through a decrease in the scope of corrections. While some of these policies are a direct continuation of the retributivist paradigm, such as cuts in rehabilitative programs,⁹² and others are cost-related, such as transfers of inmates between states⁹³ or from states to the federal authorities,⁹⁴ many proposed and implemented policies reflect a retreat from punitivism. Releasing inmates, closing prisons, limiting parole supervision, shifting the focus to noncustodial sentencing options, and emphasizing reentry alternatives constitute a revolutionary 180-degree turn from punitive discourse, which is propelled solely by the issue of cost.

However, there is another way to understand the emergence of humonetarianism. Rather than a cost-based turn away from punitive discourse, humonetarianism can also be seen as a direct continuation of the actuarial-managerial practices of New Penology. As in the 1990s, correctional institutions are primarily concerned with the management of the inmate population as a group.

89. Editorial, *Time to Pay for Being Tough on Crime*, SACRAMENTO BEE, Nov. 23, 2008, at 6E, available at <http://www.sacbee.com/opinion/story/1418918.html>.

90. *Id.*

91. *Id.*

92. SCOTT-HAYWARD, *supra* note 5, at 3.

93. Bouffard, *supra* note 23. This is, of course, not a neutral measure from the inmate's perspective; such transfers deprive inmates of visits from family and subjects them to care systems that do not necessarily follow the constitutional standards set by their home state. These are some of the reasons why the Federal three-judge panel has rejected inmate transfers as an acceptable solution for the health care system crisis. *Coleman v. Schwarzenegger*, NO. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at *388 (E.D. Cal. Aug. 4, 2009).

94. Undocumented immigrant transfers are also not a neutral measure. Undocumented immigrants handed to federal authorities end up serving longer sentences than their original sentences, under worse conditions. Marisa Lagos & John Côté, *New Sanctuary Proposal on Protecting Youths*, S.F. CHRON., Aug. 18, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2009/08/18/MN5K198PE1.DTL>.

Humonetarian techniques are an attempt to continue managing the population, albeit with scarcer resources. Parole supervision and drug tests are substituted by a retreat from parole; in both cases, there is little concern over the parolee as an individual, but rather over the resources and practices necessary to manage parolees as a group.

Indeed, this is not the first time that lean times have affected the scope of the correctional apparatus. In their study of trends in state imprisonment between 1971 and 1991, David Greenberg and Valerie West observe that prison construction and prison population fluctuate with the economy;⁹⁵ in times of scarcity, prison population tends to decline. This suggests that humonetarianism is a special version of managerialist strategy, tailored for lean times.

ii. The Characteristics of Humonetarianism

Humonetarianism is primarily characterized by a detachment from a discursive focus on the individual offender, in favor of a growing prominence of the managerial probabilistic discourse that characterized Feeley and Simon's "new penology."⁹⁶ However, humonetarianism approaches aggregates of offenders from a somewhat different perspective. Rather than focusing on the risk levels posed by categories of offenders, humonetarianism focuses primarily on the costs these groups impose on the correctional system.

With this change in focus comes a change in categorization. Rather than approaching categories of offenders through differing levels of risk, humonetarianism focuses on the groups of offenders whose processing and confinement is the most costly. Therefore, the discourse places less emphasis on groups perceived as dangerous, such as violent offenders and sex offenders,⁹⁷ and more emphasis on groups of offenders formerly ignored in correctional discourse, such as the elderly, the infirm, and the mentally ill. Three-striker offenders are viewed not through a prism of dangerousness or desert, but as long-term inmates whose confinement becomes more taxing as they

95. David F. Greenberg & Valerie West, *State Prison Populations and Their Growth, 1971-1991*, 3 CRIMINOLOGY 615, 639 (2001).

96. Feeley & Simon, *supra* note 38.

97. There still is, however, some attention paid to keeping them within walls — the language of risk has not entirely died. Inmate reduction plans, as discussed below, target non-violent offenders.

age.⁹⁸ There is also a renewed interest in undocumented immigrants. However, rather than viewing them as potentially harmful elements,⁹⁹ the focus is on the potential of diverting them away from state institutions and into federal hands.

An important feature of humonetarianism is the extent of its detachment from partisan politics. While some humonetarian practices, such as inmate release, generate discord across party lines,¹⁰⁰ a striking development is the growing number of conservative politicians making non-punitive suggestions under the banner of small government and cost saving. Prior to the outbreak of the financial crisis, even progressive politicians could not be seen as supporting a “soft on crime” policy;¹⁰¹ in the new lean economy, cost-related arguments neutralize such policies and increase their palatability.

The objectives of humonetarianism are, in essence, managerial, but good management of the offender population is defined more narrowly. The focus is mostly on reducing costs. As with managerialism, humonetarianism offers a continuum of alternatives, from confinement to GPS tracking and the like; these techniques are adopted on the basis of their economic efficiency, rather than on their ability to manage risk.

Humonetarian practices are shaped to generate short-term improvement in cost allocation, rather than on creating a long-term continuum of control. Thus, technology-based supervision is preferred not only to custodial alternatives, but also to community-based rehabilitative initiatives. The other distinct feature of humonetarianism is the focus on inaction, rather than action. Policies of scarcity seldom include innovations in the form of new institutions and practices, but rather a decrease in usage of the existing ones: releasing inmates, closing down prisons, canceling expansion projects, and prosecuting less crime.

98. Editorial, *Time to Pay for Getting Tough on Crime*, SACRAMENTO BEE, Nov. 23, 2008, at 6E, available at <http://www.sacbee.com/opinion/story/1418918.html>.

99. Jaxon van Derbeken, *S.F. Fund Aid Teen Felons Who Are Illegal*, S.F. CHRON., Aug. 3, 2008, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/08/03/MNJH120OUN.DTL>.

100. Steve Wiegand, *Delay in Prison Decision Rescues California Budget Deal*, SACRAMENTO BEE, July 23, 2009, at 3A, available at http://www.sacbee.com/politics/story/2048605.html?mi_rss=State%2520Politics.

101. SIMON, *supra* note 42, at 34-35.

Finally, throughout the humonetarian universe, discussions of approaches and techniques for cost saving are divorced from the broader discussion of the social and environmental aspects of criminality. Criminogenic social circumstances are absent from the discussion. The relationship between crime, punishment and the broader social realities is discussed only in the context of saving on corrections on behalf of other community resources, such as education and health care.

II. Humonetarianism in Action

As the following “snapshots” of current correctional discourse demonstrate, humanitarianism operates at all stages and levels of correctional policymaking, impacting the trajectory of the criminal process from prosecution to post-incarceration supervision. The following examples also demonstrate how humonetarian discourse operates on the macro state level as well as on micro-level local settings. The examples are presented in the order in which they affect the criminal process, starting with initiatives which narrow the net of criminalization (by changing offense definition and prosecutorial priorities), through changes in sentencing policies and a downscaling of punishment, to various prison decrowding options and limitations on post-incarceration supervision.

A. Narrowing the Net of Criminalization

The last few months have seen several conversations focused on the initial stages of the criminal process. Suggested policies for decreasing the amount of cases that enter the process in the first place have taken several forms: decriminalization, particularly of marijuana, a reluctance to add new criminal offenses, and downsizing the prosecutorial mechanism.

i. Changes to the Penal Code: Converting Felonies into Misdemeanors

One option considered by the governor, as well as by lawmakers, is achieving a reduction in incarceration for low-level offenses by opting to prosecute them as misdemeanors rather than felonies. Under California law, a category particularly pliable to this manipulation is that of “wobblers”: offenses that can be prosecuted as either felonies or misdemeanors. By opting to try offenses such as drug possession and vehicle theft as misdemeanors, the Governor hopes to save \$100 million (presumably per year).¹⁰² Adopting this option is, however, up to the legislature,¹⁰³ and is hotly contested by prosecutors, who see drug possession and car theft as “progressional offenses,” which are indicative or predictive of more severe criminal activity.¹⁰⁴ The California Attorney General has expressed a general dislike toward the proposals, specifically tackling the humoneterian discourse accompanying them, and advocating a preference for emphasizing “public safety, not costs.”¹⁰⁵

This reaction pertains not only to the plan to prosecute “wobblers” as misdemeanors, but also to another proposal targeting the penal code: the plan to increase the threshold separating petty theft from grand theft from \$400 to \$950, thus changing a legal definition that has been in effect since 1982.¹⁰⁶ The other source of critique is local jail personnel, who are concerned about overcrowding of their own facilities because more offenses will now be categorized as misdemeanors, thus resulting in an increase in the already large jail inmate population.¹⁰⁷

102. Mediha Fejzagic DiMartino, *Governor Tries to Reduce Prison Populations with Law Changes and Parole Reform*, DAILY BULL., June 8, 2009.

103. *Id.*

104. Such approaches have been espoused by San Bernardino County Deputy District Attorney Michael Dowd and by San Bernardino County Deputy District Attorney Thomas Colclough, with the latter referring to wobbler transformation as “the worst thing we can do.” *Id.*

105. *Id.*

106. CAL. PENAL CODE § 487(a) (West 2008). Dowd insists that the \$400 threshold for grand theft is there for a reason: “Most of your major appliances are \$300 to \$400. Someone can break into your house, steal your TV and your stereo and your used computer and still not qualify for a felony.” DiMartino, *supra* note 102.

107. A Solano County supervisor, Mike Reagan, estimates that his county will be sent an additional 1,200 inmates a year under the plan. If the plan is adopted, Solano County will have to release some low-level prisoners to make room for the new arrivals. Los Angeles County Sheriff, Lee Baca, concurs that the plan would require release of some offenders. Sheriff’s department spokesman, Steve Whitmore, says the plan could send 4,000 inmates to Los Angeles County, which is already near its court-ordered capacity. White, *supra* note 22. Shasta County is facing similar problems. A Legislative Analyst’s Office employee stated that counties might have to employ more probation sentences. Los Angeles County Chief Probation Officer, Robert Taylor, said the plan would also strain the county’s underfunded system for supervising probationers.

ii. *Resuscitating the Marijuana Debate*

One particular aspect of decriminalization is the above-mentioned reincarnation of the debate over marijuana legalization. Currently, while simple possession of marijuana is a criminal offense, possession below a certain quantity does not entail criminal prosecution, though this is not widely known to the Californian public.¹⁰⁸ Under certain regulatory arrangements, private dispensaries are allowed to provide marijuana to customers registering with a physician's referral.¹⁰⁹ This status quo could change through two California proposals regarding legalization of general consumption marijuana: Assembly Bill 390 ("The Marijuana Control, Regulation and Education Act"), and a citizen-driven legalization initiative for the 2010 ballot ("Tax Cannabis 2010").¹¹⁰ In addition, there have been municipal initiatives, as well as attempts to coordinate the federal and state policies regarding marijuana and to temper the federal approach. The novelty of the new proposals lies in their breadth, as well as in the emphasis on the fiscal potential of taxing marijuana as a luxury item, not dissimilar to alcohol or cigarettes.

In California, Assembly Bill ("AB") 390 would legalize the possession, sale, cultivation, and other conduct relating to marijuana and its derivatives by those twenty-one years of age and older, as

The strain may even be worse for small counties. For example, Yolo County is already considering closing one of its two jails and certainly will not have space for any state prisoners. Molly Hennessy-Fiske & Richard Winton, *Bid to Divert California Prisoners to County Jails Denounced*, L.A. TIMES, May 23, 2009, available at <http://www.latimes.com/news/local/la-me-jails23-2009may23,0,5415230.story>. The Legislative Analyst's Office also observes that the diversion option would lead more offenders to the county system, thus increasing jail overcrowding. See also DiMartino, *supra* note 102.

108. Robert MacCoun, et al., *Do Citizens Know Whether Their State Has Decriminalized Marijuana? A Test of the Perceptual Assumption in Deterrence Theory*, paper presented at the 3RD ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120930 (follow hyperlink under SSRN, New York).

109. U.S. Drug Enf. Admin., California Medical Marijuana Information, <http://www.usdoj.gov/dea/ongoing/calimarijuana.html> (last visited Aug. 23, 2009).

110. There is also a San Francisco proposal to provide medical marijuana through the Department of Public Health, rather than private dispensers, and a State Senate resolution to end raids on marijuana dispensaries. Marisa Lagos, *Mirkarimi Proposal: Let S.F. Sell Medical Pot*, S.F. CHRON., Apr. 15, 2009, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/14/MN10172HH8.DTL>.

well as impose a fifty-dollar-per-ounce tax on marijuana sales.¹¹¹ A state Board of Equalization analysis concluded that \$1.3 billion per year would be collected from the associated tax revenues; it also predicted that legalization would cut the street price of marijuana in half as well as lead to an increase in consumption,¹¹² though other bill supporters disagree on the expected increase in consumption.¹¹³

However, the legalization and taxation scheme would not be triggered until “federal law permits possession and sale consistent with this program.”¹¹⁴ Remarkably, Governor Schwarzenegger has responded to AB 390 by expressing interest in a public debate on the merits of marijuana legalization and taxation, although he did not explicitly support the bill.¹¹⁵

A California voter initiative, titled “The Control, Regulate and Tax Cannabis Act of 2010,” would grant counties the authority to regulate and tax marijuana, and would legalize possession of up to one ounce.¹¹⁶

111. Medical Marijuana, and marijuana not used for ingestion, would be exempt from the tax. Assem. 390, 2009 Leg., Reg. Sess. (Cal. 2009).

112. Wyatt Buchanan, *Ammiano Wants to Make Marijuana Legal in State*, S.F. CHRON., Feb. 24, 2009, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/23/BAO416354C.DTL&type=politics&tsp=1>.

113. Bruce Mirken, a spokesman for the Marijuana Policy Project, which advocates for reform in marijuana laws and supports AB 390, said any expected increase in consumption is false. However, Betty Yee, the chairwoman of the Board of Equalization, believes the \$50 tax will decrease consumption by eleven percent. Steve Gutwillig, the state director of Drug Policy Alliance, said that teen smoking has decreased and minors report that it is easier to get marijuana than tobacco. *Id.* Research conducted in the U.S., as well as in other countries, suggests that legalization would not significantly impact use rates: A Cato Institute report found that, in the five years after decriminalization of marijuana, illegal drug use by teens dropped and HIV infections from sharing dirty needles declined. GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009). The number of people seeking treatment doubled and the lifetime marijuana use rate of people over fifteen years of age is 10 % — in the U.S., the rate is 39.8% for those over age twelve. While Portugal and the U.S. are not directly analogous, this evidence at least suggests that decriminalization (and possibly legalization) does not necessitate a spike in drug use — although the Board may still hold to its position because their argument is based on price, not necessarily criminal penalty, social taboo, or other variables. Drug use is also much lower in the Netherlands, which permits possession of small amounts of marijuana. As of 2001, the lifetime prevalence of marijuana use (in individuals ages twelve and older) was 36.9% in the U.S. and seventeen percent in the Netherlands. The past month prevalence was 5.4% in the U.S. and three percent in the Netherlands. THE NETHERLANDS COMPARED WITH THE UNITED STATES, <http://drugwarfacts.org/cms/?q=node/67/pdf> (last visited June 14, 2009).

114. Assem. 390, 2009-10 Leg., Reg. Sess. (Cal. 2009).

115. L.A. Now, *Schwarzenegger Open to Studying Marijuana Tax Idea*, L.A. TIMES, May 5, 2009, <http://latimesblogs.latimes.com/lanow/2009/05/schwarzenegger-open-to-studying-marijuana-tax-idea.html>.

116. Tax Cannabis 2010, <http://www.taxcannabis2010.org/> (last visited June 14, 2009).

On the municipal level, San Francisco Supervisor Ross Mirkarimi has proposed legislation that would create a pilot program for medical marijuana sales.¹¹⁷ Mirkarimi envisions the Department of Public Health distributing marijuana to patients through city clinics.¹¹⁸ It is important to point out that such legislation benefits from a federal policy that may be more relaxed regarding marijuana dispensation in accordance with state regulations; U.S. Attorney General Eric Holder has stated that the federal authorities will only prosecute those violating both federal and state law, and therefore will allow San Francisco to dispense its marijuana independently, provided the policies comply with California regulations.¹¹⁹

There have been more general indications of federal leniency regarding marijuana, as well as state-initiated requests for such leniency. State Senator Mark Leno introduced Senate Joint Resolution 14, which urges the federal government to end medical marijuana raids in California.¹²⁰ The resolution requests the creation of a comprehensive federal policy to ensure safe and legal access for patients who benefit from its medical use.¹²¹

On the federal level, the recently proposed House Rule (“H.R.”) 2835 aims to move marijuana from a Schedule I to a Schedule II drug category, as well as eliminate federal authority to interfere with patients, caregivers, and collectives operating in accordance with state law.¹²² The drug category change would be significant because, by removing the “no medical value” label of Schedule I, research into marijuana’s medical benefits becomes much more tenable.¹²³ There are further indications of federal receptiveness to a more lenient policy. While the new Head of the Office of National

117. Lagos, *supra* note 110.

118. *Id.*

119. *Id.*

120. Joe Eskenazi, *Mark Leno Introduces ‘Joint Resolution’ Urging End to Crackdowns on Medical Pot. We Are Not Making This Up*, SNITCH, June 9, 2009, http://blogs.sfweekly.com/thesnitch/2009/06/mark_leno_introduces_joint_res.php.

121. *Id.*

122. Ryan Grim, *Frank Pushing Bill to Legalize Medical Pot*, HUFFINGTON POST, June 12, 2009, http://www.huffingtonpost.com/2009/06/12/frank-pushing-bill-to-leg_n_215077.html.

123. *Id.* H.R. 2835 may be Frank’s response to the apparent death of H.R. 5843, which has been stuck (or died) in the Subcommittee on Crime, Terrorism, and Homeland Security since April 28, 2008. Govtrack — H.R. 5843 status, <http://www.govtrack.us/congress/bill.xpd?bill=h110-5843> (last visited Oct. 21, 2009). H.R. 5843 would have removed federal penalties for possession of up to one hundred grams of marijuana and the not-for-profit transfer of up to one ounce. Act to Remove Federal Penalties for Personal Use of Marijuana by Responsible Adults, H.R. 5843, 110th Cong. (2008).

Drug Control Policy under the Obama Administration, Gil Kerlikowske, does not support marijuana legalization,¹²⁴ his previous activities as Seattle Police Chief indicate both a willingness to assign these cases a lower priority,¹²⁵ and lesser enthusiasm for the “War on Drugs.”¹²⁶

iii. Refraining from Criminalization: The Demise of Proposition 6

As proposals for decriminalization and legalization are being considered, proposals for criminalization have been rejected by voters, mostly on the basis of costs. One such example was Proposition 6, known to its supporters as the “Safe Neighborhoods Act,” which was rejected by California voters in November of 2008. The initiative proposed to criminalize various activities pertaining to gang-related street crime.¹²⁷ The campaign supporting the proposition focused on issues of public safety,¹²⁸ emphasizing the need to protect the public by increasing penalties for juvenile offenders, gang members, and offenders who carry loaded or concealed weapons, as well as to provide “sustainable funding to our local police, sheriffs, and prosecutors.”¹²⁹ In addition to these traditional tough-on-crime messages, the informational video provided by supporters stated that the proposal allowed for “lower cost jail construction when overcrowding threatens early inmate release.”¹³⁰

The opposition to Proposition 6 focused primarily on the issue of costs, arguing that the measure was “costly,” “ineffective,” “unproven,” “wasteful,” and “dangerous.”¹³¹ The website focused on humoneterian rhetoric, arguing that “Proposition 6 will cost

124. Kate Pickert, *Gil Kerlikowske: Obama's New Drug Czar*, TIME, Feb. 13, 2009, available at <http://www.time.com/time/politics/article/0,8599,1879306,00.html>.

125. *Id.*

126. William Yardley, *Some Find Hope for a Shift in Drug Policy*, N.Y. TIMES, Feb. 16, 2009, at A13, available at http://www.nytimes.com/2009/02/16/us/politics/16czar.html?_r=1&scp=1&sq=Some%20Find%20Hope%20for%20a%20Shift%20in%20Drug%20Policy&st=cse.

127. Safe Neighborhoods Act, Cal. Proposition 6 (2008).

128. Fact Sheet, Yes on Prop. 6, <http://www.safeneighborhoodsact.com> (last visited Aug. 5, 2009).

129. *Id.*

130. Informational Video, Yes on Prop. 6, <http://www.safeneighborhoodsact.com> (last visited Aug. 5, 2009).

131. Fact Sheet, *supra* note 128.

taxpayers more than ONE BILLION in the first year, threatening state funding for schools, health care and public safety programs.” The state budget’s deficit was mentioned in the second sentence. The opposition also cited the Legislative Analyst’s prediction that the Proposition will cost \$965 million to implement, plus \$500 million in one-time costs for prison construction.¹³² While other arguments against the proposition were made, the most prominently displayed ones were those concerning costs and scarcity.¹³³

Nonpartisan information for voters tended to summarize the arguments on behalf of Proposition 6 as public safety-related, and the arguments against it as cost-related.¹³⁴ These themes also appeared in newspaper coverage of Proposition 6: Newspaper editorials in opposition to the initiative revolve around the theme of scarcity, and the need to prioritize spending.¹³⁵ The few editorials and letters supporting the proposition cited the importance of protecting public safety from budgetary woes,¹³⁶ and suggested low-cost supervision mechanisms such as GPS technology for gang members.¹³⁷

iv. Refraining from Prosecution: Cost-Driven Cutbacks in Prosecutorial Policy

District Attorneys have opposed various decriminalization initiatives on public safety grounds, but there are some examples of prosecutorial humonetarianism as well. One such example is the decision announced by Contra Costa County District Attorney Robert J. Kochly to refrain from prosecuting several misdemeanors, including drug offenses, simple assault or battery, and misdemeanor

132. *Id.*

133. *Id.*

134. *Voter Minute: Proposition 6* (Center For Governmental Studies 2008), <http://www.youtube.com/watch?v=5nbfPJ9bTFg> (last visited Nov. 2, 2009). *See also Proposition 6* (Oakland League of Women Voters Oct. 7, 2008), <http://www.youtube.com/watch?v=wOEp9sh7yXE> (last visited Nov. 2, 2009).

135. Editorial, *Proposition 6: The Worst Case of Ballot-Box Budgeting*, SAN JOSE MERCURY NEWS, Sept. 30, 2008, available at http://draft.seiuca.org/Editorial_Proposition_6_the_worst_case_of_ballot_box_budgeting.aspx.

136. Perry L. Reniff, Letter to the Editor, *Letters: Proposition 6 Would Help Public Safety*, CHICO ENTERPRISE-RECORD, Oct. 12, 2008.

137. George Runner, Op-Ed., *Prop. 6 Sets Aside Funds to Go After Gang-Related Crime*, S.F. CHRON., Oct. 9, 2008, at B7, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/10/09/EDOG13DMBR.DTL>.

property crimes.¹³⁸ The explanation provided for this decision was a classic example of humonetarian discourse:

Unfortunately, we have now reached a point where we cannot maintain the status quo, and I am faced with the reality of informing all of our law enforcement partners that we will definitely be doing “less with less” as a prosecution agency. With the budget cuts imposed on my office last month, we will be laying off six deputy district attorneys effective April 30th, and 11 more deputy district attorneys will have to be let go at the end of this calendar year. We can no longer continue to prosecute all crimes as we have in the past.¹³⁹

The decision was met with criticism from the public safety perspective. The Contra Costa County’s Board of Supervisors expressed concern about the impact of the decision on the county’s constituents.¹⁴⁰ In addition, several police officers noted their intention to continue making arrests for offenses that would not be prosecuted under the new policy.¹⁴¹

B. Downscaling the Prison Population

Another aspect of humonetarianism, which has received abundant publicity in the last few months, is the effort to reduce the prison population, with the intention to decrease corresponding correctional expenses. On August 20, 2009, the California Senate approved, by a small majority, the Governor’s plan to decrease the prison population by 27,300 inmates. Subsequently, however, the California Assembly approved a much narrower version of the

138. Henry K. Lee, *Many Contra Costa Crooks Won’t Be Prosecuted*, S.F. CHRON., Apr. 22, 2009, at B1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/22/BAK9176EGO.DTL&hw=contra+costa&sn=001&sc=1000>.

139. *Id.*

140. Forum posting by Allan Payton, CONTRA COSTA TIMES, Apr. 23, 2009, <http://prod.forums.contracostatimes.com/topic/supe-bonilla-wants-review-of-da-kochlys-policy>.

141. See Malaika Fraley & Robert Salonga, *Misdemeanor Arrests Will Continue Despite Contra Costa D.A. Cuts*, CONTRA COSTA TIMES, Apr. 1, 2009, available at http://www.contracostatimes.com/ci_12200786.

plan.¹⁴² The original plan consisted of several elements, some of which involved early releases from prisons and others consisting of transferring certain types of inmates to other jurisdictions. It is important to point out that the Governor's plan was submitted for Senate approval merely days before a Federal three-judge panel, considering relief under the Prison Litigation Reform Act,¹⁴³ decided that the defunct prison health care system could only be remedied by a population reduction of approximately 40,000 inmates.¹⁴⁴ The most recent panel order in this matter recommended reviewing the original Governor's plan in order to assess whether it would yield this level of population reduction.¹⁴⁵ While the panel's order stems from the necessity to bring the prison system into compliance with at least minimal constitutional standards, the State plan emerged out of the necessity to cut the correctional budget by \$1.2 million.¹⁴⁶ Despite the different motivations and scales, the state's proposal and the panel's suggestions to the state share similar components: good work credits, early release of the old and infirm, transferring undocumented immigrants from state to federal jurisdiction, and downsizing California's universal parole system.

i. Closing Prisons and Canceling Prison Expansions

Several states, such as Michigan and New York, have turned to closing institutions in order to save costs.¹⁴⁷ In California, one such proposal is to close down one of the state's six juvenile prisons in which staff members outnumber juvenile prisoners.¹⁴⁸ Another proposal — to sell San Quentin Prison in order to raise funds from

142. Matthew Yi, *Prison Plan Guttled by State Assembly*, S.F. CHRON., Aug. 28, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2009/08/28/BA3P19ELN4.DTI>.

143. 18 U.S.C. § 3626.

144. *Coleman v. Schwarzenegger*, NO. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at *388 (E.D. Cal. Aug. 4, 2009).

145. *Id.*

146. Sam Stanton, *Governor's Inmate Reduction Program: How Will It Work?* SACRAMENTO BEE, Aug. 4, 2009, at 1A, available at <http://www.sacbee.com/arnold/story/2077156.html>. The California Attorney General has announced his intention to appeal the order, and at the time of this publication, it is unclear whether the Supreme Court will affirm it or reverse it. The existence of a rivaling state plan may be a consideration in reversing the order. Hadar Aviram, *Confronting Overcrowding*, DAILY JOURNAL, Aug. 14, 2009, at 5.

147. SCOTT-HAYWARD, *supra* note 5, at 6.

148. Most juvenile offenders have been incarcerated in local county programs since 2007. Only serious and violent offenders are held in state facilities. The state juvenile prison population is currently around 1,600; staff is over 3,200. DiMartino, *supra* note 102.

the sale of the prime land — has received more media attention.¹⁴⁹ San Quentin currently has 5,300 inmates and holds California's death row; moving them would entail finding an alternative location for death row.¹⁵⁰ The overcrowding problem has stalled previous efforts to close the prison and sell the land.¹⁵¹ It is estimated that, even after building a new prison to house San Quentin's population, the state could net \$1 billion from the sale.¹⁵² Given the recent decision to invest in improving death row to accommodate its growing population, the sale plan may not occur.¹⁵³

Plans for prison expansion also appear to have been affected by lack of funds. These include plans to build new prisons,¹⁵⁴ as well as plans for constructing prison hospitals and other health care facilities. The state's proposal to alleviate overcrowding by expanding existing prisons or building new ones, for which the California Department of Corrections and Rehabilitation ("CDCR") at one point sought funding,¹⁵⁵ has been rejected by the three-judge panel in *Plata/Coleman* as an unrealistic solution in the current crisis.¹⁵⁶

Another area impacted by the crisis is the improvement of the prison health care system. The federal receiver in charge of the California prison health care system made several proposals for improving prison medical facilities, which have been declared to fall

149. Associated Press, *Sell San Quentin? Some Inmates Say No*, MSNBC, June 8, 2009, <http://www.msnbc.msn.com/id/31174835/>.

150. *Id.*

151. *Id.* It is also important to keep in mind that San Quentin is unique because it has a large pool of local volunteers, and is therefore able to offer various educational and sports programs for inmates, including the Prison University Project, which offers classes that lead to associate's degrees. Had the sale plan gone through, many of these beneficial programs would be lost — most certainly the University Project.

152. *Id.*

153. Bob Egelko, *Governor Approves New San Quentin Death Row*, S.F. CHRON., July 30, 2009, at D1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/30/BAD2190L4J.DTL>.

154. George Skelton, *So Many Urgent Projects Await Budget Solution*, L.A. TIMES, Feb. 5, 2009, available at <http://articles.latimes.com/2009/feb/05/local/me-cap5>. Incidentally, the cancelation of prison expansions affects the economy in other ways as well: it was expected to generate construction employment. Rose Braz, *Bill to Propel \$12 Billion Prison Construction Project Sent to Governor with Budget Package*, BAY VIEW: NAT'L BLACK NEWSPAPER, Jan. 9, 2009, available at <http://www.sfbayview.com/2009/bill-to-propel-12-billion-prison-construction-project-sent-to-governor-with-budget-package/>.

155. Don Thompson, *California Prepares to Expand 3 Prisons*, The Real Cost of Prison Weblog, Apr. 1, 2009, http://realcostofprisons.org/blog/archives/2009/04/california_prep.html.

156. *Coleman v. Schwarzenegger*, NO. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at *388 (E.D. Cal. Aug. 4, 2009).

beneath minimal constitutional standards.¹⁵⁷ These proposals were widely criticized, partly due to their perceived high costs.¹⁵⁸ After much struggle, criticism, and litigation, the Federal Receiver for the prison health care and the CDCR reached a compromise, under which two new hospitals would be built. Additionally, one underused juvenile facility,¹⁵⁹ as well as existing prison facilities,¹⁶⁰ would be converted to spaces for health care.¹⁶¹ Despite cuts, several states, including California, are in the process of planning reentry facilities for released inmates, in the hopes of saving funds by providing housing and opportunities so that the recidivism (and subsequent incarceration) will be reduced.¹⁶²

ii. Early Release Based on Good Credit Systems

Several states, including Colorado, Illinois, Ohio, and Oregon, award inmates early release from prison for completion of certain educational or vocational rehabilitation programs.¹⁶³ Such systems have historical precedents in the British Empire's penal colonies and in the U.S. Whenever they were implemented, they generated impressive results in recidivism reduction. Nevertheless, when implemented as innovations by single reformers, they have always drawn sharp political criticism.¹⁶⁴

157. Associated Press, *Proposed Deal Reached for California Inmate Care*, CONTRA COSTA TIMES, May 28, 2009, available at http://www.contracostatimes.com/ci_12473080.

158. *Id.* See also Matthew Rothfield & Eric Bailey, *Deep Cuts Proposed for California Prison Healthcare Plan*, L.A. TIMES, May 29, 2009, available at <http://www.latimes.com/news/local/la-me-prisons29-2009may29,0,6577746.story>.

159. Associated Press, *supra* note 157.

160. Chronicle Staff and News Services, *Tentative Deal on State Prison Medical Care*, S.F. CHRON., May 29, 2009, at B4, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/05/29/BA8517T2G4.DTL>.

161. It is unclear whether these proposals will go through after the approval of the budget cuts. The two new facilities would be paid for with bonds issued in a way that does not directly require legislators' approval. PrisonMovement Weblog, *Proposed Deal for California Inmate Care*, May 30, 2009, <http://prisonmovement.wordpress.com/2009/05/30/proposed-deal-for-calif-inmatecare/>. Funds are already available from the passage of 2007's AB 900, which set aside \$7.7 billion for prison construction and rehabilitation initiatives. In a status report the Legislative Analyst recommended that the state take advantage of lease revenue bonds to fund the receiver's construction plans. It is also important to point out that the proposal, which preceded the Coleman decision by several months, anticipated the possibility of an inmate release order. MediaNews Editorial, *California Must Act on Reasonable Prison Health Care Deal*, CONTRA COSTA TIMES, June 4, 2009.

162. SCOTT-HAYWARD, *supra* note 5, at 8.

163. *Id.* at 9.

164. Scottish public servant Alexander Maconochie implemented a good credit system,

The current version of good credits is limited to certain types of programs, which vary from state to state.¹⁶⁵ In California, good credits are awarded to inmates who participate in disaster relief or conservation projects.¹⁶⁶

The recently approved proposal for correctional savings would expand the California good credits program to other programs, such as earning GED diplomas and completing various vocational training programs. The total amount of savings is estimated at \$42 million.¹⁶⁷ The advantage of reliance on good credit systems for alleviating overcrowding is supported by abundant empirical evidence; states that used these systems overwhelmingly did not see an increase in recidivism.¹⁶⁸

iii. Early Releases of Old and Infirm Prisoners Under GPS Monitoring

The California legislature hopes to save \$120.5 million by allowing elderly or infirm prisoners to finish their sentences at homes or hospitals under GPS monitoring.¹⁶⁹ The focus on this population is due to the expenses involved in their incarceration.¹⁷⁰ While lengthy prison sentences are not the main contributors to prison overcrowding,¹⁷¹ the cost of holding elderly and infirm inmates rises

which he called "marks," at the Norfolk Island penal colony in Australia. His methods led to a dramatic reduction in recidivism rates, but he was relieved from his position when word of his progressive methods reached England. NORVAL MORRIS, *MACONCHIE'S GENTLEMEN: THE STORY OF NORFOLK ISLAND AND THE ROOTS OF MODERN PRISON REFORM* (2003). Another notable reformer to use good credits was Thomas Murton, the renowned Warden of Arkansas prison. THOMAS MURTON, *THE DILEMMA OF PRISON REFORM* (1976).

165. Alison Lawrence, NAT'L CONF. OF STATE LEGISLATURES, *CUTTING CORRECTIONS COSTS: EARNED TIME POLICIES FOR STATE PRISONERS 1* (2009), available at http://www.ncsl.org/Portals/1/Documents/cj/Earned_time_report.pdf.

166. *Id.* at 1.

167. Yi & Buchanan, *supra* note 25.

168. In fact, some studies found lower recidivism rates for early-released inmates than for inmates who served their full term. Lawrence, *supra* note 165, at 3.

169. Yi & Buchanan, *supra* note 25.

170. Editorial, *Time to Pay for Getting Tough on Crime*, SACRAMENTO BEE, Nov. 23, 2008, at 6E, available at <http://www.sacbee.com/opinion/story/1418918.html>.

171. John Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J CRIM. L & CRIMINOLOGY 547, 618-19 (2008). Pfaff's study did not include California, but there are indications that the California prison population is mostly the product of massive numbers of short-term inmates, many of them for parole violations. Jeanne Woodford, *California Injustice: Doing Nothing But Time*, S.F. CHRON., Apr. 3, 2009, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2009/04/03/ED5Q16RQAU.DTL&hw=parole&sn=014&sc=355>.

due to their toll on prison health care.¹⁷² Qualifying inmates for this plan would need to be at least sixty years old or severely ill and have less than one year to serve.¹⁷³ The fate of this plan depends on the extent to which the Governor's reduction plan, mentioned earlier, will be implemented as a response to the *Plata/Coleman* court order.¹⁷⁴

Should California adopt "geriatric parole," it will not be the only state to do so. New York has recently expanded the eligibility requirements of its current medical parole policy for a projected cost savings of \$2 million annually. Washington has introduced a new geriatric and medical parole release policy, which allows early release for adult inmates who are chronically or terminally ill and fifty-five years or older. Wisconsin's Earned Release Review Commission (formerly the Parole Commission) was given the authority to release inmates with extraordinary health conditions to extended supervision as long as public safety is maintained.¹⁷⁵

iv. Deportation of Undocumented Immigrant Inmates

A fundamental part of the California state plan for population reduction includes early release and deportation of undocumented immigrant inmates.¹⁷⁶ The Governor's Finance Department estimates that \$182 million could be saved if 8,000 of the 19,000 undocumented prisoners were deported.¹⁷⁷ However, to be eligible for commutation, an inmate must have only one felony conviction, and it must be for a crime that was not violent or sexual, or on a list of other disqualifying crimes.¹⁷⁸ Thus, finance and legislative officials estimate that only about 1,400 undocumented prisoners fit the commutable profile, which would save only \$32 million.¹⁷⁹ Four thousand more inmates convicted of more than one nonviolent, nonsexual felony could be eligible, but the California Supreme Court

172. Editorial, *supra* note 170.

173. Yi & Buchanan, *supra* note 25.

174. Yi, *supra* note 142.

175. SCOTT-HAYWARD, *supra* note 5, at 11.

176. Yi & Buchanan, *supra* note 25.

177. Susan Ferriss, *Early Release for Immigrant Inmates Raises Questions*, SACRAMENTO BEE, June 8, 2009, at 1A.

178. *Id.*

179. *Id.*

would have to agree to it.¹⁸⁰ To reach the 8,000 mark, the legislature would have to get involved and redefine some felonies as misdemeanors.¹⁸¹ However, this is unlikely to happen.

Some question the wisdom of releasing immigrants early for deportation.¹⁸² In 2007, California prisons turned over about 12,000 paroled inmates to the federal government for deportation, only to discover that 1,600 had committed parole violations back in California and thus should have remained in California custody.¹⁸³ The Finance Department spokesman said the Governor will not commute any sentence unless deportation is guaranteed.¹⁸⁴

A few states have signed up with the U.S. Immigration and Customs Enforcement ("ICE") for "Rapid REPAT" — Removal of Eligible Parolees Accepted for Transfer — which allows nonviolent undocumented inmates to serve half of their sentence if they agree to not contest deportation.¹⁸⁵ If later caught on U.S. soil, they would be required to serve the second half of the sentence, plus additional federal charges for re-entering the country illegally.¹⁸⁶ Earlier this year, Assemblyman Dan Logue introduced AB 1208, urging the legislature to join a version of Rapid REPAT.¹⁸⁷ So far the bill has not made any progress.¹⁸⁸

C. Cost-Related Retreats from the Death Penalty: Abolition and Moratoria

A surprising example of humoneterianism is the rise of cost-related arguments in the discourse surrounding the death penalty, made not only by death penalty opponents, but also by conservative officials and lawmakers.

According to the Death Penalty Information Center ("DPIC"), as of May 1, 2009, thirty-five states imposed the death penalty, and

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

fifteen states did not.¹⁸⁹ Since the reinstatement of the death penalty,¹⁹⁰ 1060 individuals have been executed. Kansas and New Hampshire have not executed a person since 1976.¹⁹¹ California has executed only thirteen people since 1976, and the remaining 678 California inmates live in the largest death row in the nation.¹⁹² The national average time spent by an inmate on death row between sentence and execution has risen from fifty-one months in 1984 to 153 months in 2007,¹⁹³ and the costs associated with this lengthy period of incarceration are supplemented by the expenses of lengthy state and federal litigation.¹⁹⁴

While Governor Schwarzenegger has recently approved constructing a new death row to alleviate overcrowding, hardly a humonitarian move or a cost-saving one,¹⁹⁵ other recent developments point to lesser enthusiasm with regard to the death penalty, on the national level as well as in California. Propelled by economic realities, several states have examined repealing the death penalty or placing moratoria on executions.¹⁹⁶ In 2009, eleven states that currently impose the death penalty introduced bills to repeal it.¹⁹⁷ As of May 6, 2009, none of these bills had passed in Colorado,

189. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 1 (2009), *available at* <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

190. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976).

191. *Id.*

192. San Quentin Death Row has 678 inmates as of January 2009. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DEATH ROW USA (Winter 2009), *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2009.pdf.

193. *Id.* The national average time spent between sentence and execution has risen from fifty-one months in 1984 to 153 months in 2007. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2007 — STATISTICAL TABLES (2007), <http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/cp07st.htm> (last visited Aug. 8, 2009).

194. The yearly expenses on California death row litigation are \$14.74 million in Supreme Court processing costs, \$13 million in prosecuting expenses, and \$14.14 million in costs to the Public Defender's office. Life imprisonment in California costs about \$23 million less per year than the death penalty. Nancy Oliveira, *What We Sacrifice on Death Row*, S.F. CHRON., June 30, 2008, *available at* <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/06/30/EDDB11GCT8.DTL>. See also DEATH PENALTY INFO. CTR., RECENT LEGISLATIVE ACTIVITY 4 (2009), <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited May 6, 2009) (citing various studies).

195. Egelko, *supra* note 153.

196. Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 24, 2009, at A1, *available at* http://www.nytimes.com/2009/02/25/us/25death.html?_r=4&page-wanted=1&hp.

197. See DEATH PENALTY INFO. CTR., *supra* note 194. These states are Colorado, Connecticut, Illinois, Kansas, Maryland, Montana, Nebraska, New Hampshire, New Mexico, Texas, and Washington. *Id.*

Kansas, or Maryland,¹⁹⁸ but New Mexico has abolished the death penalty. The seven remaining state legislatures have not yet ruled on their respective bills.¹⁹⁹

The recent set of considerations, which led to the repeal of the death penalty in New Mexico and which are being considered in California, consist of a mix of the classic ethical and deterrent arguments with a newer emphasis on the issue of costs. Upon signing the bill to repeal the death penalty, New Mexico Governor Richardson — formerly a staunch supporter of the death penalty — mentioned various moral and practical considerations,²⁰⁰ but stated that the financial cost of imposing the death penalty was a consideration when deciding whether to pass the anti-death penalty bill.²⁰¹ Financial consideration played an important part in the new crop of legislation proposals to repeal the death penalty in other states as well.²⁰²

The recent death penalty arguments in the Californian context are a perfect example of humoneterian, bipartisan politics. Opponents of the death penalty have supplemented the traditional ethical arguments and wrongful conviction statistics with cost-based arguments.²⁰³ More remarkably, staunch supporters of the death penalty have come to doubt its efficiency, in cost-benefit terms, and are calling for its demise. One notable example is Tom Harman's recent op-ed article in the *San Francisco Chronicle*, in which the conservative lawmaker argues that the constant delays in execution "have weakened the death penalty's effect on deterring crime."²⁰⁴ The cost argument was made even more explicitly by John Van de Kamp, former California Attorney General and Los Angeles District

198. *Id.*

199. *Id.*

200. Elaine de Leon, *Money, Morality, and Repealing the Death Penalty*, RELIGION & ETHICS NEWSWEEKLY, Apr. 24, 2009, <http://www.pbs.org/wnet/religionandethics/episodes/april-24-2009/money-morality-and-repealing-the-death-penalty/2757/>.

201. *Id.*

202. *Id.*

203. Natasha Minsker of the ACLU claims that abolishing the death penalty will save \$1 billion in five years, which includes eliminating the need to construct a new Death Row facility. Natasha Minsker, *Save \$1 Billion in Five Years — End the Death Penalty in California*, <http://blog.aclu.org/author/nminsker/> (May 21, 2009).

204. Tom Harman, *Legal Stalling Is Packing Death Row*, S.F. CHRON., June 15, 2009, at A13, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/06/15/EDUK186A23.DTL>.

Attorney, in an opinion piece in the *Los Angeles Times*. His argument, which more explicitly refers to the costs, is as follows:

According to the final report of the California Commission on the Fair Administration of Justice, which I chaired from 2006 to 2008, the cost of a murder trial goes up by about half a million dollars if prosecutors seek the death penalty. Confinement on death row (with all the attendant security requirements) adds \$90,000 per inmate per year to the normal cost of incarceration. Appeals and habeas corpus proceedings add tens of thousands more. In all, it costs \$125 million a year more to prosecute and defend death penalty cases and to keep inmates on death row than it would simply to put all those people in prison for life without parole.²⁰⁵

Prior to the Governor's decision to expand death row, humonetarian arguments against the death penalty led Republican and Democrat lawmakers to join forces in an attempt to object to the planned expansion.²⁰⁶ The arguments of lawmakers from both political parties, both of whom support the death penalty in principle, mirrored each other. Jeff Denham, a Republican senator from Merced County, said that "[t]he Death Row expansion is a bottomless money pit." Jared Huffman, a Democrat Senator from San Rafael, said that "[w]e should use this opportunity, with the state running out of cash, to step back and rethink this project."²⁰⁷ Despite the Governor's move to rebuild death row, the opposition to the death penalty seems to be on the rise, bolstered by humonetarian grounds.

D. Narrowing the Scope of Post-Imprisonment Supervision

The California Three Strikes Law and other measures guaranteeing lengthy incarcerations are often perceived as the

205. John Van de Kamp, *California Can't Afford the Death Penalty*, L.A. TIMES, June 10, 2009, available at <http://www.latimes.com/news/opinion/commentary/la-oe-vandekamp10-2009jun10,0,2187018.story>.

206. Bob Egelko, *2 Lawmakers Team Up to Oppose Death Row*, S.F. CHRON., Dec. 17, 2008, at B5, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/12/17/BAET14PGO7.DTL&hw=san+quentin&sn=001&sc=1000>.

207. *Id.*

hallmark of the punitive era. Nevertheless, the dramatic increase in prison population is mainly the product of large numbers of short-term incarcerations,²⁰⁸ including a substantial percentage of returning inmates whose parole had been revoked.²⁰⁹ The contribution of parole to the overcrowding problem and the associated costs have pushed several states, including California, to seek ways to minimize the costly effects of the “revolving door” of prison.

i. Doing Away with Universal Parole

Several states have adopted mechanisms to minimize the effect of parole on the prison population. Some states, such as Texas and Washington, have reduced their supervision requirements to encompass a smaller population of parolees.²¹⁰ Other states, such as Arizona and Nevada, have adopted a good-credit mechanism for parolees, such as the one for early releases, who earn early discharge from parole supervision.²¹¹ There have also been developments with regard to parole revocation: New York, Wyoming, Missouri and Arkansas have a system of graduated responses for technical violators, so that only serious or recurring violations will lead to a return to prison.²¹² Finally, some states have strengthened the authority of parole review boards. In Michigan, for example, the parole board has been expanded from ten to fifteen members, in order to expedite parole reviews. In Idaho, resources are provided to the state’s Pardons and Parole Commission to hasten the release of inmates incarcerated past their parole eligibility dates. In Mississippi, the department of corrections and the parole board are coordinating efforts to examine cases of nonviolent inmates.²¹³

In California, the recent humanitarian initiatives challenge parole policies which have been in place since the passage of the Uniform

208. Woodford, *supra* note 171.

209. In the 2008 calendar year, 32,660 inmates were second strikers, and 8,454 were third strikers. This is not a negligible number, but it is much smaller than that of newly admitted parole violators (74,531 within the same calendar year). Cal. Dep’t of Corr. & Rehab., Corrections — Moving Forward 19 (2009), available at http://www.cdcr.ca.gov/News/2009_Press_Releases/Oct_01.html.

210. SCOTT-HAYWARD, *supra* note 5, at 7.

211. *Id.*

212. *Id.*

213. *Id.* at 11.

Determinate Sentencing Act in 1977.²¹⁴ With the introduction of determinate sentencing, parole boards lost much of their discretionary power,²¹⁵ but the state retained a system of almost universal parole, consisting of post-incarceration supervision for a period of time after release.

The recently approved state plan projects \$30 million in savings by diverting some parole violators to county jails, rather than state institutions; but more importantly, the plan is to reform the state's parole system so as to exclude some low- and moderate-risk offenders from parole revocation, a measure aimed at saving \$198.5 million.²¹⁶ Moreover, certain serious offenders would be eligible for early parole discharge (up to sixty days) if they successfully complete drug treatment.²¹⁷

ii. The Decline of the Punitive Victim Model? The Demise of Proposition 9

Much of the punitive legislation in the 1990s has been attributed to victim organizations and pro-victim voter initiatives. The most recent incarnation of such a bill in California was Proposition 9, also known as "Marsy's Law," and The Crime Victims' Bill of Rights Act. The bill was comprised of a list of victim rights in the criminal process, many of them duplicative of existing procedures, and of limitations on parole eligibility and right to representation in parole revocation hearings.²¹⁸ While the measure was approved by California voters in November 2008, the implementation of its parole-related aspects has been circumvented by Judge Lawrence Karlton, by way of a consent decree on due process grounds.²¹⁹

Nevertheless, it is important to point out the role played by cost-related arguments in the Proposition 9 campaign, which was framed

214. CAL. PEN. CODE §§1170 - 1170.95 (2008).

215. See generally PETERSILIA ET AL., *supra* note 28. This effect is often less noticed than the shift of discretion from the hands of judges to prosecutors and legislators prompted by the new regime. STITH & CABRANES, *supra* note 33.

216. Yi & Buchanan, *supra* note 25.

217. SCOTT-HAYWARD, *supra* note 5, at 11.

218. Crime Victims' Bill of Rights Act of 2008: Marsy's Law, available at http://ag.ca.gov/cms_attachments/initiatives/pdfs/i771_07-0100_a1ns.pdf (last visited Aug. 23, 2009).

219. Denny Walsh, *Judge Tosses Some Prop. 9 Restrictions on California Parolee Rights*, SACRAMENTO BEE, Mar. 27, 2009, at A4, available at <http://www.sacbee.com/capitolandcalifornia/story/1732834.html>.

as a typical victim-centered initiative.²²⁰ The Yes on 9 website featured, among other arguments, a section on the costs of crime.²²¹ Acknowledging the opponents' arguments about the potential costs of the measure, the Yes on 9 campaign urged voters not to worry about increased costs incurred by Marsy's Law since prisoners are already treated too well, but the website did not claim that measure would decrease prison costs.

The opponents' arguments, however, featured costs as a central argument against the measure. The front page of the No on Proposition 9 website announced that "Proposition 9 is an expensive and unnecessary effort to reform California's prison system."²²² The webpage repeatedly referred to the measure's costs,²²³ and the fact sheet on the website cited several economic arguments as reasons to reject the proposition.²²⁴ Similar cost-related arguments were invoked by the measure's opponents in a video provided by the Center for Governmental Studies²²⁵ and in several newspaper articles and editorials.²²⁶

This broad range of examples illustrates the main features of humoneterianism. Low cost solutions are proposed and implemented in all stages of the criminal process. They are supported by conservative and progressive lawmakers alike, and the substantive arguments on their behalf are supplemented — and in some cases replaced — by cost-related arguments. The proposals and policies

220. Marsy's Law Home Page, <http://www.friendsofmarsyslaw.org/>, (last visited Aug. 23, 2009).

221. Marsy's Law Home Page, *Cost of Crime Initiatives – Ballot Arguments: Let's Talk About Cost*, <http://www.friendsofmarsyslaw.org/cost-of-crime.htm> (last visited Aug. 23, 2009).

222. No on Prop. 9 Home Page, <http://www.votenoprop9.com/> (last visited Aug. 23, 2009).

223. *Id.*

224. Reasons Why Not to Vote for Prop 9, http://www.votenoprop9.com/facts_facts.html (last visited Nov. 18, 2009).

225. Ctr. for Governmental Studies, *California Prop. 9 Opponent Interview* (2008), <http://www.youtube.com/watch?v=NMfKOGF7BA&feature=channel> (2009).

226. Op-Ed., *California Voters Pass Historic Crime Victims' Bill of Rights Act of 2008*, BUSINESS WIRE (New York), Nov. 5, 2008; Editorial, *Prop. 9: Victim' Rights*, VISALIA TIMES-DELTA, Oct. 29, 2008, at 7A; Andy Furillo, *Ballot Watch: Proposition 6: Law Enforcement Spending*, SACRAMENTO BEE, Oct. 4, 2008; Editorial, *Endorsements 2008: Keep Justice Blind: Prop. 9 Constitutionally Upends the Criminal Justice System by Involving Victims' Families in Prosecutions*, L.A. TIMES, Sept. 26, 2008 at A28; Jenny Price, Op-Ed., *Prop. 9 Is Unjust*, L.A. TIMES, Oct. 31, 2008; Editorial, *Budget Busters: The Chronicle Recommends: No on Props. 6 and 9*, S.F. CHRON., Oct. 9, 2008, at B6; Editorial, *Prop. 9's Many Victims*, L.A. TIMES, Nov. 9, 2008, at A33; Denny Walsh, *Judge Tosses Some Prop. 9 Restrictions on California Parolee Rights*, SACRAMENTO BEE, Mar. 27, 2008; Denny Walsh, *Judge Puts Measure on Hold After Its Validity Challenged*, SACRAMENTO BEE, Dec. 13, 2008; Carol Woods, Letter to the Editor, *Vote No on Proposition 9*, EUREKA TIMES STANDARD, Oct. 9, 2008.

target specific groups of offenders, inmates and parolees, which are particularly costly or easy to divert out of the system. In short, humonetarianism is everywhere.

III. The Promise and Pitfalls of Humonetarianism

A. The Power of Scarcity-Driven Arguments to Reduce Punitive Sentiments

The promise of humonetarian discourse lies in its appeal to the public. As the examples above illustrate, the last months have seen an unprecedented rise in non-punitive policies and practices; one has to assume that these would not have gone through under strong public objection. Moreover, one striking phenomenon is the lessened discomfort of politicians from all parties in making humonetarian suggestions, which suggests that proposing “soft on crime” initiatives is less costly, politically, if one cites costs to justify these initiatives. To the extent that previous punitive policies were driven, in part, by the politicians’ concerns about public reception of non-punitive suggestions, the financial crisis seems to have lessened these concerns. How punitive is the public, and does humonetarian rhetoric increase the palatability of non-custodial sentencing and decriminalization?

One possible explanation for the acceptability of non-punitive options, since the financial crisis, may lie in a public ideological shift, as reflected in the 2008 presidential election results. Indeed, several studies link broad political perspectives to public punitiveness. Comparative public surveys show that countries with centralized governments and with less democratic freedoms generate not only more punitive laws,²²⁷ but also a more punitive population.²²⁸ Countries with a strong tradition of non-custodial sentencing alternatives tend to yield less punitive attitudes.²²⁹ Moreover, the public tends to absorb and internalize the

227. Martin Killias, *Power Concentration, Legitimation Crisis and the Penal Severity*, in PUNISHMENT AND PRIVILEGE 95, 109-113 (W. Byron Groves & Graeme Newman, eds., 1986).

228. Helmut Kury & Theodore Ferdinand, *Public Opinion and Punitivity*, 22 INT’L J. OF L. & PSYCHIATRY 373, 379 (1999).

229. Neville M. Blampied & Elizabeth Kahan, *Acceptability of Alternative Punishments: A Community Survey*, 16 BEHAVIOR MODIFICATION 400 (1992).

government's attitude regarding punishment.²³⁰ Within the U.S., rises in punitive public opinion have been consistently preceded by governmental initiatives and media campaigns.²³¹

Variations in punitiveness tend to reflect broader differences in political ideology; in fact, such broad opinions have consistently been found to have much more impact on the formation of punitive opinions than actual experiences of victimization.²³² In a study of the British public, factors such as concerns about the economy and the state of "the youth today" were found to account for a substantial proportion of the effect of actual crime concerns on punitiveness.²³³ Similar trends, connecting punitiveness with strong emotions or sentiments, were found with regard to the American public;²³⁴ when controlling for racial prejudice, political ideology, and other factors, anger about crime is shown to be a significant predictor of punitive attitudes.

Some issues are especially prone to strong political emotions. One such example is the death penalty, which is framed by supporters as a broad moral issue. The death penalty is constructed as a symbol of justice, a triumph of sorts of the good (the innocent victim) over the evil (the capital murderer). This essentialist perspective eliminates all consideration of costs, let alone empathy for the offender.²³⁵ Similarly, support for California's Three Strike

230. Kury & Ferdinand, *supra* note 228, at 386.

231. BECKETT, *supra* note 33. Beckett maps political and media campaigns, as well as changes in public opinion, and finds that the punitive initiatives originate with politicians and trickle top-down, rather than rise from the public.

232. Surprisingly, a 2002 study found that crime victims tended to be more supportive than the general public of a progressive and balanced approach to criminal justice issues, particularly with regard to rehabilitation, length of sentences, and nonviolent offenders. PETER D. HART RESEARCH ASSOCS., INC., OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 1, 19 (2002), available at http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf. For a more thorough analysis, also pointing to the lesser importance of victimization experiences as punitiveness prediction, see generally Darrin L. Rogers, *Structural Analysis of Treatment and Punishment Attitudes Toward Offenders* (2004) (unpublished dissertation), Ohio State University.

233. Anna King & Shadd Maruna, *Is a Conservative Just a Liberal Who Has Been Mugged? Exploring the Origins of Punitive Views*, 11 PUNISHMENT & SOC'Y 147 (2009). Interestingly, crime-related factors, such as victimization experiences or anxieties about crime in particular, did not appear to predict punitiveness. *Id.* at 160.

234. Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUNISHMENT & SOC'Y 51, 61 (2009). The study uses U.S. National Survey data, specifically, the 2001 Race, Crime and Public Opinion Study. *Id.* at 55.

235. Mona Lynch, *Capital Punishment as Moral Imperative: Pro-Death-Penalty Discourse on the Internet*, 4 PUNISHMENT & SOC'Y 213, 222 (2002).

Law in its early days was a reflection of people's broader political convictions. Three Strikes supporters were not particularly concerned about crime in particular, but expressed broader concerns about the decline in the importance of family values and the deterioration in morality.²³⁶ Public opinions on gun control and violence legislation were also found to be a function of cultural heritage and broader political views.²³⁷

However, any shift in political opinions would not be enough to explain the turn away from punitive policies. It is unlikely that deeply held cultural worldviews were transformed at the time of the 2008 elections or as a result of the financial crisis. Moreover, punitive political views might actually be enhanced by economic anxiety. Studies have found that economic anxiety contributes to a tendency to view crime as a national problem, thus increasing its salience and yielding less empathy for the "undeserving poor," or those seen as the potential criminal underclass.²³⁸ A tendency to blame welfare, affirmative action, and immigration is the strongest predictor of punitiveness.²³⁹ These attitudes are consistent across demographic categories,²⁴⁰ though they tend to be somewhat more common among white males, lending some support to the "angry white male" stereotype.²⁴¹

The other explanation for the success of humonetarianism may be that the assumption of public punitiveness has always been simplistic and exaggerated. Punitiveness could be perceived as the spiraling effect of a "chicken and egg" problem. Indications of

236. Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, But Why? The Psychology of Public Support for Punishing Rule Breaker*, 31 LAW & SOC'Y REV. 237, 252-253 (1997).

237. ARTHUR L. STINCHCOMBE ET AL., CRIME AND PUNISHMENT — CHANGING ATTITUDES IN AMERICA 7 (1980).

238. Michael T. Costelloe, Ted Chiricos & Marc Gertz, *Punitive Attitudes Toward Criminals: Exploring the Relevance of Crime Salience and Economic Insecurity*, 11 PUNISHMENT & SOC'Y 25, 41-44 (2009).

239. Michael J. Hogan, Ted Chiricos & Marc Gertz, *Economic Insecurity, Blame, and Punitive Attitudes*, 22 JUSTICE QUARTERLY 392, 405 (2005).

240. The expectation that women would be, on the whole, less punitive than men has been found to be unsubstantiated; women are less punitive than men only with regard to youth offenders. Nevertheless, women's punitiveness tended to be accompanied by support for rehabilitative programs. Jane B. Sprott, *Are Members of the Public Tough on Crime? The Dimensions of Public "Punitiveness"*, 27 J. CRIM. JUSTICE 467, 470 (1999).

241. Costelloe et al., *supra* note 238, at 24. Costelloe et al. attribute the lesser support of this view by women and minorities to the fact that these groups benefit from affirmative action programs. *Id.* at 242.

punitiveness in public polls may have been generated by political campaigns,²⁴² and poorly constructed polls, in turn, have misled politicians to believe that punitiveness is the way to the voters' hearts.²⁴³ And, indeed, a survey of public punitiveness research reveals a complex and nuanced picture, which might explain the public's receptiveness to humanitarian cutbacks on punitive measures.

Data regarding punitiveness during the 1970s and 1980s reveals a set of complex attitudes toward law enforcement and punishment. A California study conducted in Systematic research found similar trends. An early California survey, conducted in 1972 (before the demise of rehabilitative ideology), found that the public supported punitive measures as well as rehabilitative programs,²⁴⁴ and, in fact, believed that parole officers were too hasty to return parolees to prison.²⁴⁵ During the 1980s, however, as penal ideology shifted away from rehabilitation and toward an emphasis on just desert, surveys and polls reported highly punitive trends. A national survey conducted at the time compared the public's proposed punishments for a hypothetical set of criminals to the actual sentencing rates, and found considerable punitive trends; in fact, the findings suggested that, had the public's will been faithfully applied to actual convictions, the additional correctional costs would have been very high.²⁴⁶ However, another study conducted in 1986, following the introduction of determinate sentencing, yielded more moderate results.²⁴⁷ Californian respondents were asked about the appropriate punishment for six categories of crime, ranging from petty theft to rape and homicide. Researchers concluded that the community's views about appropriate punishments did not differ greatly from the average sentencing at the time, and when the public did deviate, it

242. BECKETT, *supra* note 33.

243. SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 254 (Michael Tonry & Kathleen Hatlestad, eds., 1997).

244. Field Research Corporation, *Public Opinion of Criminal Justice in California: A Survey* 21 (Institute of Governmental Studies, University of California, 1974).

245. *Id.* at 105. Negative perspectives on correctional personnel were more common than negative opinions of court personnel, and public defenders were held in high regard. *Id.* at 97-98.

246. Sherwood E. Zimmerman, David J. Van Alstyne & Christopher S. Dunn, *The National Punishment Survey and Public Policy: Consequences*, 25 J. RES. CRIME & DELINQ. 120, 142 (1988).

247. William Samuel & Elizabeth Moulds, *The Effect of Crime Severity on Perceptions of Fair Punishment: A California Case Study*, 77 J. CRIM. L. & CRIMINOLOGY 931, 939 (1986).

was more lenient than the contemporary sentencing levels.²⁴⁸ Public polls, however, reported widely held punitive attitudes.²⁴⁹

Moreover, to the extent that these earlier studies showed punitive tendencies, newer research casts doubt on the simplistic “punitive public” assumption and suggests a more nuanced picture. The earlier generation of public opinion surveys has been criticized for their simplistic framing of sentencing dilemmas;²⁵⁰ poll and study respondents were often presented with atypical examples of crime, as well as with generalized assertions, which led them to express more punitive opinions than the ones they would actually hold given specific and balanced scenarios.²⁵¹ In one study examining the amount of support for Three Strike Laws, for example, respondents were first asked for their general, or global, opinion about “three strikes” laws; over eighty-eight percent of the sample favored such a law. However, respondents were then presented with a vignette describing a hypothetical offender who would qualify for a life sentence without the possibility of parole under “three strikes,” and asked to select a sentence. Using this more specific measure, it was discovered that only seven percent of respondents favored life without the possibility of parole and only ten percent favored life in prison with the possibility of release after twenty-five years.²⁵²

The more widely held view among public punitiveness scholars is that public support for “get-tough” policies is “mushy.”²⁵³ While a range of punitive policies receives public support, citizens may be willing to substitute a sentence of life imprisonment without parole for the death penalty. Especially when nonviolent offenders are involved, there is substantial support for intermediate sanctions and for restorative justice. Despite three decades of criticism, rehabilitation — particularly for younger offenders — remains an integral part of Americans’ correctional philosophy; there is also

248. *Id.* at 946.

249. In an ABC poll in 1982, ninety percent of respondents said they would approve constructing new prisons so that sentences could increase, even if it meant an increase in taxes. Christopher A. Innes, *Recent Public Opinion in the United States Toward Punishment and Corrections*, 73 *PRISON J.* 220, 227 (1993).

250. SENTENCING REFORM IN OVERCROWDED TIMES, *supra* note 243, at 251.

251. *Id.* at 523.

252. Jody L. Sundt, *Is There Room for Change?: A Review of Public Attitudes Toward Crime Control and Alternatives to Incarceration*, 23 *S. ILL. U. L. J.* 519, 522-23 (1989).

253. Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion about Punishment and Corrections*, 27 *CRIME & JUST.* 1, 31 (2000).

widespread support for early intervention programs. The public, therefore, displays a mix of punitiveness and support for progressive rehabilitative policies.

Punitiveness has also been shown to be strongly correlated with misinformation regarding punishment options; the rate of punitiveness declines, and support for rehabilitation increases, when the public is better educated about alternatives to incarceration. A meta-analysis of public polls has showed that, when studies were sensitive enough to control for familiarity with crime and the criminal justice system, the public is no more punitive than the judiciary.²⁵⁴ In particular, the public tends to overestimate the magnitude of crime, the risks of property crime victimization, and recidivism rates.²⁵⁵

Several studies, conducted in various states, such as Alabama,²⁵⁶ Pennsylvania,²⁵⁷ Delaware,²⁵⁸ and the District of Columbia,²⁵⁹ reveal broad public support for rehabilitation and for community-based sentencing alternatives when the public learns more about their availability. Studies measuring punitiveness before and after educating respondents about boot camps, drug programs, and the like, show significant changes in opinion, shifting away from punitivism and toward alternatives.²⁶⁰ There is also broad consensus regarding the need to emphasize rehabilitation in corrections, at the expense of retribution,²⁶¹ particularly in programs for inmates,²⁶² and for juveniles, and first-time offenders.²⁶³ The public is also consistently less supportive of the incarceration of non-violent drug

254. Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 110 (1992).

255. *Id.*

256. SENTENCING REFORM IN OVERCROWDED TIMES, *supra* note 243, at 255.

257. Sundt, *supra* note 252, at 519, 526.

258. John Doble, *Attitudes to Punishment in the US — Punitive and Liberal Opinions*, in CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE 148, 156 (Julian V. Roberts & Mike Hough, eds., 2002).

259. Francis T. Cullen et al., *Public Support for Correctional Rehabilitation in America: Change or Consistency?* in CHANGING ATTITUDES TO PUNISHMENT, *supra* note 258, at 128, 136.

260. Catriona Mirrlees-Black, *Improving Public Knowledge about Crime and Punishment*, in CHANGING ATTITUDES TO PUNISHMENT, *supra* note 258, at 184, 193. The study was conducted by the British Home Office.

261. Cullen et al., *supra* note 253, at 138.

262. Christopher A. Innes, *Recent Public Opinion in the United States Toward Punishment and Corrections*, 73 PRISON J. 220, 229 (1993).

263. Cullen et al., *supra* note 253, at 139.

offenders.²⁶⁴ When responding to questions addressing complex penological considerations, the public is shown to embrace multiple aims of punishment,²⁶⁵ exhibiting care for public safety while also embracing non-custodial alternatives.²⁶⁶ The public limits its punitive energy to violent and repeat offenders, as well as white collar criminals, and is far less willing to incarcerate street criminals with no criminal history.²⁶⁷

The deep commitment to rehabilitation has been affirmed in studies measuring willingness to pay for such programs; the public is willing to bear expenses involved in rehabilitative programs, even including treatment for sex offenders.²⁶⁸ Interestingly, with regard to undocumented immigrants — whose deportation via the federal authorities is one of the main paths to alleviate overcrowding in the California plan — the public has been shown to support deportation as opposed to incarceration, particularly for immigrants with no criminal history.²⁶⁹

The importance of considering additional information is particularly salient with regard to the costs of corrections, a topic directly relevant to the success of humonetarian discourse. Studies providing respondents with information on costs of corrections yield lower rates of punitivism. In an Illinois survey conducted by Thompson and Ragona, respondents were asked to provide sentences in residential burglary cases. The survey provided respondents with information regarding the consequences of their sentencing choices, including fiscal consequences. Respondents were willing to consider a range of community options, albeit more severe than pure probation. Only seven percent of respondents went as far as to suggest sentences as severe as the mandatory guidelines in effect at the time.²⁷⁰

264. See generally MARK A. COHEN, ROLAND T. RUST & SARA STEEN, NAT'L INST. OF JUSTICE, MEASURING PUBLIC PERCEPTIONS OF APPROPRIATE PRISON SENTENCES FINAL REPORT (2002), available at <http://www.nicic.org/Library/020047>.

265. Doble, *supra* note 258, at 150.

266. *Id.* at 152-53.

267. COHEN ET AL., *supra* note 264.

268. Doble, *supra* note 258, at 157.

269. COHEN ET AL., *supra* note 264.

270. Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Government Authoritarianism: An Interactionist View of Public Sentiments Toward Crime Sanctions*, 33 CRIME & DELINQ. 337, 349 (1987).

In a different study, meticulously conducted by phone using a representative sample, Cohen, Rust and Steen not only provided respondents with realistic scenarios for sentencing, but also asked about the respondents' willingness to pay for different types of correctional policies: more prison construction, more drug and alcohol treatment programs for nonviolent offenders, more police, and more prevention programs aimed at juveniles.²⁷¹ Respondents were asked about their willingness to forego a hypothetical tax rebate in order to finance each of these options. They were also asked to put themselves in the shoes of their local mayor and decide on the allocation of federal grants to each of these projects. The greatest amount of support was found for youth programs (36.6% of respondents) and the least supported option was prison construction (8.4% of respondents). Converting that into valuation, researchers concluded that the average value of a taxpayer dollar is only about seventy-one cents when spent on prison, but \$3.07 when spent on prevention.

Similar general trends have been reported by Schiraldi and Greene, who compare studies on crime-related attitudes before and after the September 11, 2001, attacks. The study finds a shift, over time, from imprisonment and toward alternative sentencing approaches.²⁷² Moreover, public support for decarceration increases when it is accompanied by rehabilitation and restitution programs.²⁷³ Finally, costs are an important part of the equation; more people support non-custodial sentences when presented with a statement that doing so would "save millions of taxpayers' dollars."²⁷⁴

Part of what might explain the palatability of recent humonetarian reforms is the public awareness to the rising costs of corrections — the blurring of the line between the visible and invisible realms of law enforcement discussed above. In 1967, the Task Force on Assessment of the President's Commission expressed its surprise that correctional cost information was far from comprehensive, considering its impact on the community.²⁷⁵ The financial crisis has made this information more widely available, and

271. COHEN ET AL., *supra* note 264.

272. Vincent Schiraldi & Judith Greene, *Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion*, 14 FED. SENT'G REP. 332, 333 (2002).

273. *Id.* at 332.

274. *Id.*

275. PRESIDENT'S COMM'N ON LAW ENFORCEMENT, *supra* note 1.

therefore generates opportunities for the public to learn more about the consequences of different correctional choices — yielding a potential decrease in punitiveness.

B. The Pitfalls of Short-Term Calculations

Notwithstanding the substantial advantages in overcoming punitivism and generating change, humonetarianism also harbors considerable perils. Creating correctional policies from a cost-centered perspective, to the exclusion of other considerations, presents some serious difficulties that should not be overlooked.

One of the advantages of humonetarian discourse is its ability to counter, in a neutral way, public safety arguments. Advocating intermediate sentences on this basis could, therefore, be merely the politicians' effort to convince the public that the government is continuing to be tough on crime while reducing prison costs.²⁷⁶ Such discourse eliminates the possibility of discussing the deeper ailments that plague the correctional system, such as irrational sentencing policies and an overrepresentation of minorities and the poor.²⁷⁷

Another problem stems from the emergency, short-term nature surrounding the correctional discourse. Cost-related arguments are double-edged swords and have had devastating effects on treatment programs, which could not only be beneficial to offenders, inmates and parolees, but also save money in the long-run due to decreased recidivism. States adopting humonetarian policies have shown a preference for short-term, low-costs solutions, such as Global Positioning System ("GPS") monitoring. Twenty states have saved correctional funds by cutting on rehabilitative programs.²⁷⁸

In the California context, these processes are illustrated by the 2008 voters' rejection of Proposition 5, also known as the Nonviolent Offender Rehabilitation Act. The campaign in favor of

276. Rebecca D. Petersen & Dennis J. Palumbo, *The Social Construction of Intermediate Punishments*, 77 PRISON J. 77, 87 (1997).

277. The original shift from indeterminate to determinate sentencing was meant, in part, to reduce sentencing disparities. AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971). However, the shift did not do away with disparities and the overrepresentation of minorities has persisted. Gerald W. Heaney, *The Realities of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 165 (1991).

278. SCOTT-HAYWARD, *supra* note 5, at 6.

the Proposition focused heavily on the issues of overcrowding in California prisons and state spending in a time of fiscal crisis, pointing to the proposition's potential to "cut state costs by \$2.5 billion."²⁷⁹ Proponents cited the Legislative Analyst's calculation, according to which "Prop. 5 would reduce prison spending by \$1 billion per year and cut prison construction costs by at least \$2.5 billion."²⁸⁰ Drug treatment and rehabilitation were advocated as "proven [measures] to cut incarceration costs."²⁸¹ The theme of budget savings repeated itself in television commercials featuring former Warden Jeanne Woodford²⁸² and discussing the correctional system's burden on taxpayers.²⁸³ Other commercials denounced the overall expenses on prison, focusing in particular on custodial staff salaries.²⁸⁴

While the campaign opposing Proposition 5 was significantly less centered around cost, focusing mostly on the public threat posed by drug offenders,²⁸⁵ the "No on Prop 5" website played the humonitarian card as well. The website mentioned that the initiative would increase bureaucracy, cost hundreds of millions of dollars, and "shift costs from the state to the counties."²⁸⁶ It also made the economic argument that, since Proposition 5 would lock in spending and could only be changed through passing another expensive ballot initiative, it was a bad idea because the governor and the legislature would be unable to adjust the funding, "even in times of budget shortfall or state crisis."²⁸⁷ Economic arguments were displayed, albeit less prominently, on the fact sheet.²⁸⁸ Such arguments were also made in the opponents' video, in which Sacramento Sheriff John

279. Yes on Proposition 5 Home Page, www.prop5yes.com (last visited Aug. 23, 2009).

280. Prop5ys.com, Prop. 5 Will Put the Brakes on California's Out-of-Control Prison Growth, <http://www.prop5yes.com/wp/wp-content/uploads/prop-5-stop-california-prison-growth.pdf> (last visited Aug. 23, 2009).

281. *Id.*

282. *Warden* (Television commercial for Yes on 5, 2008), <http://www.prop5yes.com/category/tv-ads> (last visited Aug. 23, 2009).

283. *The Bottom Line* (Television commercial for Yes on 5, 2008), <http://www.prop5yes.com/category/tv-ads> (last visited Aug. 23, 2009).

284. *The Party's Over* (Television commercial for Yes on 5, 2008), <http://www.prop5yes.com/category/tv-ads> (last visited Aug. 23, 2009).

285. People Against Proposition 5 Home Page, www.noonproposition5.com (last visited Aug. 23, 2009).

286. *Id.*

287. *Id.*

288. *Id.* This might be attributed to the fact that the Legislative Analyst report supported the proponent's assertion regarding the potential savings from the measure.

McKinley referred to the measure as a “shell game that shifts costs from the state to the counties.”²⁸⁹

Newspaper articles in support of Proposition 5 focused on its cost-saving aspects,²⁹⁰ but so did several of the articles opposing the measure, arguing that the measure was imprudent in times of crisis and that establishing the programs would require money “the state just doesn’t have.”²⁹¹

There have been other examples of cost-related cuts to programs that could, in the long run, reduce recidivism. One of Governor Schwarzenegger’s proposals included cutting the \$108 million line-item for Proposition 36 drug treatment.²⁹² While Proposition 36 is a state law, its funding was only mandated through 2006.²⁹³ Proposition 36-eligible offenders cannot be sent to prison, and therefore the burden of paying for their treatment will shift to

289. *No on Proposition 5* (Video of portion of news conference 2008), http://www.youtube.com/watch?v=_4S2SCv2x-M (last visited Aug. 23, 2009).

290. Arnold Adler, *Drug, Alcohol Diversion Program Struggles With the Economy*, HERALD AM., Jan. 1, 2009, at A1 available at www.prop5yes.com/proposition-5-policy-limits-drug-abuse; Jim Egar, Op-Ed., *Proposition 5: Policy Limits Drug Abuse*, MONTEREY COUNTY HERALD, Oct. 25, 2008 available at <http://www.prop5yes.com/proposition-5-policy-limits-drug-abuse>; Andy Furillo, *Q & A: Lawyers Clash on Prop. 5 Drug Diversion Measure*, SACRAMENTO BEE, Nov. 1, 2008; John Gramlich, *Voters Could Relax Marijuana Penalties*, MCCLATCHY TRIB. BUS. NEWS, Oct. 14, 2008; Daniel Macalliar & G. Thomas Gitchoff, Op-Ed., *Prop. 5 Would Fund Innovative Treatment for Drug Offenders*, S.F. CHRON., Oct. 10, 2008, at B11; Editorial, *No on Proposition 5*, L.A. TIMES, Sept. 26, 2008; Chris Pedersen & Jeff Kauffman, Letter to the Editor, *Vote ‘no’ on 5*, VALLEJO TIMES HERALD, Oct. 31, 2008; Peter Schrag, Op-Ed., *Peter Schrag: Props. 5 and 8 Will Make Waves Nationally*, SACRAMENTO BEE, Sept. 2, 2008; Kristen Quinlan, *On the California Ballot, Will 5 Prove Greater Than 36? Another Groundbreaking Treatment Initiative in the State Gains National Attention*, ADDICTION PROFESSIONAL, Sept. 1, 2008, at 20; Michael A. Ramos, Op-Ed., *No on Prop. 5*, INLAND VALLEY DAILY BULL., Oct. 30, 2008; Terry Vau Dell, *Drug Offender Proposition Draws Ire, Praise*, CHICO ENTERPRISE-RECORD, Oct. 29, 2008; Kathleen Wilson, *Proposition 5: Drug Measure Could Add to County Caseload: Initiative to Require More Treatment*, VENTURA COUNTY STAR, Oct. 28, 2008.

291. Roy Chernus, Op-Ed., *Proposition 5: The Wrong Answer*, SMARIN INDEP. J., Oct. 23, 2008; Editorial, *No on Proposition 5*, VENTURA COUNTY STAR, Oct. 19, 2008; Jerry Brown, Op-Ed., *The Failures of California’s Proposition 5*, HUFFINGTON POST, http://www.huffingtonpost.com/jerry-brown/the-failures-of-californi_b_140110.html; Andy Furillo, *Top U.S. Drug Cop Rips California’s Prop. 5*, SACRAMENTO BEE, Oct. 22, 2008; John Healey, Op-Ed., *In Today’s Pages: No on Props. 5, 6, 9 — and on Campaign Stunts*, L.A. TIMES, Sept. 26, 2008, <http://opinion.latimes.com/opinionla/2008/09/mccain-prop-5-6.html>; Alex Kreit, Op-Ed., *What Kind of Prison Relief Does Prop. 5 Promise?*, L.A. TIMES, Oct. 1, 2008; Ramos, *supra* note 290; Editorial, *No on Prop. 5 / A Risky Drug Plan*, S.F. CHRON., Oct. 10, 2008, at B10; Wilson, *supra* note 290.

292. *Tough Times: California Protests over HIV/AIDS Budget Cuts*, DRUG WAR CHRON., June 12, 2009, available at http://stopthedrugwar.org/chronicle/589/california_budget_HIV_AIDS_proposition_36.

293. *Id.*

counties and municipalities, which they cannot fully afford.²⁹⁴ Thus, Proposition 36-eligible offenders may receive neither incarceration nor treatment.²⁹⁵

These techniques reveal the superficiality of humonetarianism, which looks at short-term savings at the expense of systematic programs for improvement. The concern is that such techniques may prove to be counter effective in the long run. This is particularly worrisome in light of other effects of the financial crisis. The cuts in treatment programs, as well as the difficult job market, do not bode well for released inmates. Periods of unemployment generate an increase in necessity-driven crime, and, as an outcome, an increase in prison population, particularly if no systematic reentry plans are introduced.²⁹⁶ Any real or perceived rise in crime as a result of unemployment and necessity may yield an increase in public punitiveness, which could be exacerbated by economic anxiety.²⁹⁷

C. The Potential for Reform

There are, however, causes for optimism. Some of the initiatives generated during the current crisis have the potential to yield evidence-based recommendations that might create long-term change.

One such initiative is the National Criminal Justice Commission Act of 2009 ("S.B. 714"), proposed by Virginia Senator Jim Webb and introduced in the Senate on March 26, 2009.²⁹⁸ S.B. 714 is currently sponsored by a bipartisan group of twenty-nine senators.²⁹⁹ In the words of Senator Webb, "[t]he goal of this legislation is nothing less than a complete restructuring of the criminal justice system in the United States. Only an outside commission, properly structured and charged, can bring us complete findings necessary to do so."³⁰⁰ The proposal will create a commission that will undertake

294. *Id.*

295. *Id.*

296. Greenberg & West, *supra* note 95.

297. *See generally* Costelloe et al., *supra* note 238; Hogan et al., *supra* note 239.

298. Jim Webb, Nat'l Criminal Justice Comm'n Act of 2009, <http://webb.senate.gov/email/criminaljusticereform.html> (last visited Aug. 23, 2009).

299. Jim Webb, *Why We Must Reform Our Criminal Justice System*, HUFFINGTON POST, June 11, 2009, http://www.huffingtonpost.com/sen-jim-webb/why-we-must-reform-our-cr_b_214130.html.

300. *Id.*

an eighteen-month top-to-bottom review of the entire criminal justice system, both federal and state, and make specific findings on a wide variety of issues, including policy and incarceration comparisons in similar countries.³⁰¹ It will seek to propose concrete and wide-ranging reforms designed to lower the overall incarceration rate, improve federal and local responses to gang violence, restructure our approach to drug policy, improve mental illness treatment, establish a system for re-integrating offenders back into the community, and more.³⁰² Senator Webb and his staff have engaged with over 100 organizations and associations, representing prosecutors, judges, defense lawyers, former offenders, advocacy groups, think tanks, victims' rights organizations, academics, prisoners, and law enforcement.³⁰³

Webb stated that "everything should be on the table," and claims to be looking for real answers.³⁰⁴ In response to a question about legalizing, regulating, and taxing marijuana, Webb replied, "I think they should do a very careful examination of all aspects of drug policy. I've done a couple of very extensive hearings on this, so we'll wait to see what they say about that."³⁰⁵

Another encouraging development on the local level is the recent passage (albeit by a narrow majority) of the California Sentencing Commission Bill.³⁰⁶ This is the last in a series of similar bills, aimed at reforming the patchwork of sentencing laws in a systematic, consistent way. All previous incarnations of the proposal had failed or suffered a slow demise in committees.³⁰⁷ This bill, proposed by Assembly Speaker Karen Bass, makes the argument that it is better to combat the rising costs of corrections through a systematic review of the state's sentencing policies:

301. SEN. WEBB'S NAT'L CRIMINAL JUSTICE COMM'N ACT OF 2009 FACT SHEET, *available at* <http://webb.senate.gov/email/incardocs/FactSheeti.pdf> (last visited Aug. 23, 2009).

302. *Id.*

303. Webb, *supra* note 299.

304. Ryan Grim, *Jim Webb: Pot Legalization Could Be Part of Criminal Justice Overhaul*, HUFFINGTON POST, Mar. 27, 2009, http://www.huffingtonpost.com/2009/03/27/jim-webb-pot-legalization_n_180073.html.

305. *Id.*

306. Yi & Buchanan, *supra* note 25.

307. A.B. 1376 official text, *available at* http://info.sen.ca.gov/pub/09-10/bill/asm/ab_1351-1400/ab_1376_cfa_20090427_100838_asm_comm.html (last visited Aug. 22, 2009),

Our current criminal justice sentencing structure leads to seriously overcrowded facilities, financial constraints, an inability to deliver reentry services and high recidivism rates. California needs to step back and comprehensively look at our system. A sentencing entity could review our codes; look at individual sentences, policies and programs that are successful or unsuccessful in other states; incarceration and alternatives, as well as rehabilitation and public safety.³⁰⁸

While the bill has been gutted by the California Assembly, there is hope that it may be adopted as part of a comprehensive plan under pressure from the Plata/Coleman panel.³⁰⁹

These plans indicate that, while some humanitarian discourse is temporary, there is also some effort toward generating a systematic answer to decades of punitive discourse and practices. The fate of the correctional budget cut plan, and the resulting change in policies, remains to be seen. The balance between superficial, short-term savings and real, long-term solutions are what will determine whether humanitarianism lives up to its potential to reverse the punitive pendulum and generate a sane, more balanced correctional system.

308. *Id.*

309. Yi, *supra* note 142.